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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2014

MORTON HALPERIN *et al.*, APPELLANTS

v.

HENRY KISSINGER *et al.*

No. 77-2015

MORTON HALPERIN *et al.*

v.

HENRY KISSINGER *et al.*
RICHARD M. NIXON, JOHN N. MITCHELL,
AND H. R. HALDEMAN, APPELLANTS

Appeal and Cross-Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 1187-73)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued February 9, 1979

Decided July 12, 1979

Mark H. Lynch, with whom *John H. F. Shattuck* and *Jack Novik* were on the brief, for appellants in No. 77-2014.

Larry L. Gregg, Attorney, Department of Justice, for appellees in No. 77-2014 and cross-appellants in No. 77-2015. *John C. Keeney*, Acting Assistant Attorney General. *Robert L. Keuch*, Deputy Assistant Attorney General, and *George W. Calhoun* and *Lubomyr M. Jachnycky*, Attorneys, Department of Justice, were on the brief for appellees in No. 77-2014 and cross-appellants in No. 77-2015. *Benjamin C. Flannagan*, *D. Jeffrey Hirschberg*, and *Philip B. Heymann*, Attorneys, Department of Justice, also entered appearances for appellees in No. 77-2014 and cross-appellants in No. 77-2015.

Joseph E. Casey entered an appearance for appellee William Sullivan in Nos. 77-2014 and 77-2015.

James J. Bierbower entered an appearance for appellee Jeb Stuart Magruder in No. 77-2015.

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Concurring opinion filed by *District Judge* GESELL.

WRIGHT, *Chief Judge*: Morton Halperin, a former member of the National Security Council (NSC) staff, and his family sued ten federal officials for money damages following revelations that their home telephone had been tapped by the Government from May 1969 until

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

February 1971.[1] The Halperins alleged that the wiretap, which was installed during an investigation into public disclosures of confidential information,[2] was prohibited by both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[3] On cross-motions for summary judgment in December 1976 the District Court ruled in favor of all defendants except former President Richard M. Nixon, former Attorney General John N. Mitchell, and former presidential aide H. R. Haldeman.[4] The court concluded that Nixon, Mitchell, and Haldeman had violated the Halperins' Fourth Amendment rights, but not the terms of Title III. The Halperins were awarded $1 in nominal damages in August 1977.[5]

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[1] The defendants were President Richard Nixon, former Attorney General John Mitchell, National Security Adviser Henry Kissinger, presidential aides H. R. Haldeman, John Ehrlichman, Alexander Haig and Jeb Magruder, FBI Director Clarence Kelley and FBI official William Sullivan, and Assistant Attorney General Robert Mardian. The suit also named the Chesapeake & Potomac Telephone Company (C&P) as a defendant, but plaintiffs do not appeal the District Court's judgment in favor of C&P. Joining Halperin in the complaint were his wife, Ina, and their three minor children.

[2] The investigation eventually included electronic surveillance of 13 Government employees and four newspaper reporters, including the appellant in a case we also decide today, *Smith v. Nixon*, —— F.2d —— (D.C. Cir. No. 78-1526, decided July 12, 1979).

[3] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)).

[4] *Halperin v. Kissinger*, 424 F.Supp. 838 (D. D.C. 1976).

[5] *Halperin v. Kissinger*, 434 F.Supp. 1193 (D. D.C. 1977). If the court had found Title III applicable, plaintiffs would have been entitled to $100 in liquidated damages for each day of illegal wiretapping, plus punitive damages and attorney fees. *See* 18 U.S.C. § 2520 (1976).

Plaintiffs and defendants Nixon, Mitchell, and Haldeman appeal the decision.[6] The Halperins insist that the District Court erred in not applying Title III, in awarding only nominal damages, and in granting summary judgment in favor of former National Security Adviser Henry Kissinger. The defendants claim absolute immunity from this action and dispute the District Court's refusal to bar the suit on qualified immunity grounds. We affirm the District Court's conclusions on the immunity question, but reverse on the applicability of Title III, the proper measure of damages, and defendant Kissinger's motion for summary judgment. In addition, we believe that the District Court should have applied the warrant requirement for national security wiretaps as articulated in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), and *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

I. The Wiretap

Shortly after taking office in 1969 President Nixon and his top advisers grew concerned over press disclosures of classified information.[7] In their view such "leaks" limited the Administration's flexibility in developing foreign policy and could have eroded the candor of foreign governments in dealings with this country. On April 25,

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[6] Because both sides appeal the decision of the District Court, it is easier to identify the parties by their status in the trial court, in order to avoid confusion among appellants, cross-appellants, and the like. We refer to the Halperins as plaintiffs and Nixon, Mitchell, Haldeman, and Kissinger as defendants.

[7] In response to interrogatories Kissinger listed 20 newspaper articles between February 3, 1969 and May 6, 1969 that in his opinion were based on leaked information. Joint Appendix (JA) 129-132.

1969 the President met in his office with Kissinger, Mitchell, and J. Edgar Hoover, the late Director of the Federal Bureau of Investigation (FBI), to discuss methods for controlling leaks. Mitchell, Hoover, and Nixon continued the discussion over dinner at Camp David that evening and developed a program, including wiretaps on private telephones, for investigation of suspected "leakers." [8] Both Mitchell and Hoover assured Nixon that the President could order such wiretapping without first obtaining a court order.[9] Three criteria were established at the meeting for identifying individuals to be investigated: (1) access to sensitive data that was being revealed publicly; (2) information in security files that "raised questions" about an individual; and (3) other incriminating information in FBI files.[10]

Over the next two weeks the appearance of several newspaper stories seemingly based on classified reports heightened the Administration's alarm over leaks.[11] The surveillance program was finally triggered by a *New York Times* article on May 9 revealing massive American

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[8] Nixon Deposition at 18-22, 25-26; Mitchell Deposition at 20-21.

[9] Mitchell Deposition at 76-79, 81-85; Nixon Deposition at 19-21.

[10] Nixon Deposition at 61; Kissinger Deposition at 28. On these facts the District Court concluded that President Nixon "authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States." *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 840.

[11] *See Chronology of Events Relative to the Seventeen Wiretaps and Pertinent Documents*, in *Dr. Kissinger's Role in Wiretapping: Hearings Before the Senate Foreign Relations Committee*, 93d Cong., 2d Sess. 22-23 (1974) (hereinafter cited as *Kissinger Hearings*).

bombing of targets in Cambodia.[12] Nixon told Kissinger to ask the FBI to investigate the source for the story.[13] Although Halperin had no access to the information in the *Times* article,[14] FBI Director Hoover informed Kissinger that Halperin was the "prime suspect."[15] Hoover and Kissinger conferred by telephone four times that day,[16] and the wiretap on the Halperin home telephone was in place by evening.[17] Earlier that day, however, Kissinger had informed Halperin that he was considered a potential leaker, and the two men agreed that Halperin's access to classified information should be curtailed in

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[12] *Raids in Cambodia by U.S. Go Unprotested*, N.Y. Times, May 9, 1969, at 1, col. 3.

[13] Nixon Deposition at 23; Kissinger Deposition at 50.

[14] Halperin Affidavit (Nov. 12, 1973), JA 102.

[15] Kissinger Deposition at 48-49. Hoover alleged that Halperin had been a roommate of the reporter who wrote the story. *Id.* Two other items in Halperin's files were deemed to raise questions about his reliability: (1) failure to report in a 1966 Department of Defense form that he had stopped in Greece, Yugoslavia, and the Soviet Union on a previous round-the-world journey; and (2) incorrect identification of a Russian national with whom he lunched in 1967. JA 241-244; *see Kissinger Hearings*, *supra* note 11, at 182 (testimony of H. Kissinger) (blanks in testimony filled in by answers to interrogatories at JA 133). Halperin attributed the first omission to clerical oversight and the second to his error. JA 219-221. An internal FBI memorandum from Hoover identified Halperin as agreeing to a 1965 proposal for a national sit-in on the Vietnam War, as having subscribed to a Marxist publication, and as being a "so-called arrogant harvard-type [*sic*] Kennedy" man. JA 49-50. For a discussion of Halperin's allegation that he was singled out for surveillance for political reasons, *see* text accompanying notes 82-84 *infra*.

[16] *Chronology*, in *Kissinger Hearings*, *supra* note 11, at 23.

[17] *Id.* at 80 (testimony of J. Adams, Deputy Associate Director of FBI).

order to allay suspicions.[18] Three other private telephones were wiretapped in the attempt to find the source of the May 9 article.[19]

The following day FBI officials and Colonel Alexander Haig, Kissinger's assistant, worked out procedures to conduct the surveillance "with no record maintained" in normal FBI files.[20] The Bureau then formally requested wiretap authorization from the Attorney General. With respect to Halperin, the FBI memorandum stated only:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.[21]

Attorney General Mitchell approved the wiretap.[22]

The FBI agents conducting the surveillance compiled summaries of the overheard conversations, but neither

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[18] Halperin Affidavit, *supra* note 14, JA 102-103; Kissinger Deposition at 58-59.

[19] Memorandum from W. C. Sullivan to C. D. DeLoach (May 11, 1969), JA 51.

[20] *Id.*

[21] Memorandum from J. E. Hoover to Attorney General (May 12, 1969), JA 52.

[22] On May 6, 1969 Attorney General Mitchell had promulgated procedures to be followed in warrantless national security surveillance. Memorandum from the Attorney General to Director, FBI (May 6, 1969), JA 38-45. The procedures specified in that memo—including that a wiretap authorization request identify the target premises and estimate the period of surveillance—were not followed in the instant case. The Justice Department's policy of requiring renewals of wiretap authorizations every 90 days, *see* Mitchell Deposition at 9-10, was also ignored.

preserved the tapes of the conversations nor attempted to minimize overhearing of personal discussions.[23] Despite observations by the FBI in May and June of 1969 that the Halperin tap was not producing evidence of a leak,[24] Kissinger requested that the taps be continued.[25] On July 8, 1969 the FBI recommended ending some of the electronic surveillance of suspected leakers, including Halperin.[26] On September 15 Kissinger requested termination of all wiretaps except Halperin's and one other.[27] Four days later Halperin resigned from the NSC staff, although at Kissinger's request he continued as a consultant to the Council.[28]

Halperin retained his consultant position until May 1970, but had no access to classified information during that period, and worked only one day for the NSC.[29] The wiretap remained in place. Nor was there any reduction in surveillance when he resigned from his consultant posi-

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[23] Jones Deposition at 24-27.

[24] Memorandum from W. C. Sullivan to C. D. DeLoach (May 15, 1969), JA 54; Memorandum from W. C. Sullivan to C. D. DeLoach (June 20, 1969), JA 58.

[25] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55 ("Dr. Kissinger said he wanted the coverage to continue for a while longer"); Memorandum from A. Haig to H. A. Kissinger (June 4, 1969), JA 57 (series of "Talking Points" for meeting with Hoover: recommending continuing Halperin tap "so that a pattern of innocence can be firmly established").

[26] Letter from W. C. Sullivan to J. E. Hoover (July 8, 1969), JA 59 ("Halperin has said almost nothing on the telephone. My guess is that he assumes it is tapped.").

[27] Memorandum from W. C. Sullivan to C. D. DeLoach (Sept. 15, 1969), JA 60.

[28] Halperin Affidavit, *supra* note 14, JA 104.

[29] *Id.* *See* JA 161 (Kissinger's answers to interrogatories).

tion in protest over the American invasion of Cambodia in May 1970. After that resignation, however, the FBI reports on the wiretap were no longer sent to the National Security Adviser, but went to Haldeman, the President's chief administrative aide.[30] In July 1970 the FBI agent in charge of the wiretap suggested to his superior that the surveillance be lifted,[31] but it continued until February 10, 1971.[32]

Plaintiffs cite FBI logs showing that agents overheard more than 600 calls on the Halperin telephone, of which only 28 percent were between Halperin and people outside the family.[33] The summary letters from the FBI contain much political information, covering such topics

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[30] Memorandum from C. D. DeLoach to W. C. Sullivan (May 13, 1970), JA 75; Haldeman Deposition at 52-54.

[31] Note to W. C. Sullivan, JA 78 ("I haven't noticed much info of value in recent months from coverage—suggest consider discontinuing").

[32] The taps were removed at the instigation of the FBI, Memorandum from W. C. Sullivan to C. Tolson (Feb. 10, 1971), JA 81; Memorandum from J. E. Hoover to Attorney General (Feb. 11, 1971), JA 83, which had recently been criticized for its wiretapping practices. *Chronology*, in *Kissinger Hearings*, *supra* note 11, at 29 (citing Feb. 7, 1971 newspaper article criticizing FBI wiretapping). Director Hoover was scheduled to testify before Congress shortly thereafter. *See* S. Rep. No. 94-755, Book III, 94th Cong., 2d Sess. 326 (1976).

[33] Plaintiffs-appellants' brief at 11-12. The FBI logs, which are not complete, JA 115, show that 638 calls on the Halperin phone were recorded in whole or in part. Morton Halperin was party to 355 (55%) of the recorded calls on 253 separate dates, but 173 calls (27% of the total) were between him and his wife. Two hundred and seventy-seven (43%) of the calls were between Ina Halperin and persons not involved in this suit. Their three minor children were each overheard in at least one conversation in which they were identified, and 13 other log entries refer to unidentified children.

as planned publications criticizing the nation's Vietnam policy,[34] congressional lobbying on war-related legislation,[35] and political campaign plans, including potential opposition to President Nixon in 1972.[36] There is some evidence that the political information was valued at the White House. Disclosure in one of the Halperin summary letters that a former cabinet officer planned a magazine article opposing the Nixon Administration's foreign policy served as the basis for a planned "counter-attack" to the anticipated article.[37] The FBI summaries

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[34] Letter from J. E. Hoover to H. R. Haldeman (Oct. 14, 1970), addendum to plaintiffs-appellants' brief at 3 ("Halperin said he was writing a paper on the President's speech which he intended to give Max Frankel of the 'New York Times' to use as he desired. He also said that he was writing a newspaper article on Vietnam.").

[35] Letter from J. E. Hoover to H. R. Haldeman (May 26, 1970), *id.* at 2 (discussion of McGovern-Hatfield Amendment to cut off military funds); Letter from J. E. Hoover to H. R. Haldeman (June 23, 1970), *id.* at 3 (Halperin "agreed to talk to the 'top people' in the offices of Senators Norris Cotton and James B. Pearson on the war in Cambodia. [ ] described Senator Cotton as 'marginal' on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson favor the amendment.").

[36] Letter from J. E. Hoover to H. R. Haldeman (Nov. 13, 1970), *id.* at 4 ("Halperin and [ ] also discussed a meeting which may take place this week to advise Senator Muskie concerning 'China policy.'"); Letter from J. E. Hoover to H. R. Haldeman (Dec. 17, 1970), *id.* (discussed "forthcoming trip by Senator Edmund Muskie to Russia and said Muskie was making the trip recommended by Clifford * * *. He also mentioned that Averell Harriman was going with Muskie.").

[37] An FBI letter to Kissinger on December 29, 1969 said that Halperin had discussed a proposed article in *Life Magazine* by Clark Clifford, former Secretary of Defense, on Vietnam. JA 64. The letter identified foreign policy statements by Nixon that Clifford intended to attack (*e.g.*, that President Thieu of South Vietnam "is one of the five greatest men of our

revealed no evidence suggesting that Halperin was leaking classified data.[38]

The records of the Halperin wiretap were minimal. At first the FBI logs were kept at the Bureau in special files, where Kissinger and Haig reviewed them.[39] Subsequently summary letters were sent to Kissinger, Nixon (through presidential counsel John Ehrlichman), and occasionally Mitchell.[40] As noted above, after May 1970 only Haldeman received the letters. When the surveillance was terminated the records were stored in a White House safe. The wiretap program first came to public attention in the 1973 espionage trial of Dr. Daniel Ellsberg, when the Government admitted that Ellsberg had been overheard by the FBI on Halperin's home telephone.[41] This suit was filed in June 1973, within a month of that disclosure.

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time"; that "Vietnam is one of the finest hours in United States history"). The White House staff researched the alleged quotations, *see* Memorandum from Jim Keogh to Jeb Magruder (Jan. 12, 1970), JA 69, and Ehrlichman wrote to Haldeman, "This is the kind of early warning we need more of—your game planners are now in an excellent position to map anticipatory action." JA 70. The Clifford article never appeared.

[38] Part of the relief granted in the District Court was an order that Halperin's security file be amended to include "a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion." *Halperin v. Kissinger*, *supra* note 5, 434 F.Supp. at 1196.

[39] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55.

[40] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 841.

[41] *United States v. Russo and Ellsberg*, No. 9373 (C.D. Cal., Order of May 11, 1973). The Ellsberg prosecution, which followed public disclosure of the Pentagon Papers, was dismissed when the Government refused to produce the Halperin wiretap records.

II. Individual Rights and National Security

This case presents the conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated in any surveillance situation.[42] In such a case we must carefully consider any impact that our decision might have on the nation's ability to defend itself and its vital interests. Equally, as the Supreme Court has said, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile."[43] Because of the significance of the competing interests at stake, we wish to consider their relationship before addressing the particular claims here.

Plaintiffs assert two intertwined constellations of personal rights: those revolving around privacy interests and those growing out of the First Amendment's guarantees of freedom of speech, press, association, and belief. The damage to privacy caused by Fourth Amendment violations was captured by Justice Brandeis' dissent in *Olmstead v. United States*:[44]

> [The Framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendent. * * *

The First Amendment buttresses the individual's protection against indiscriminate or unreasonable wiretapping.

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[42] *See United States v. United States District Court (Keith)*, 407 U.S. 297, 313 (1972).

[43] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[44] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Such surveillance invades the citizen's constitutionally protected right to free private discussion,[45] and must inevitably chill public speech. Either result is intolerable.

In recent years both the Supreme Court [46] and Congress [47] have recognized the substantial injury to personal rights caused by unreasonable electronic surveillance. Although the technology of investigation has developed dramatically in the last century, the dangers of unwarranted governmental intrusion into citizens' private lives have not changed since Justice Bradley wrote in *Boyd v. United States*:[48]

> It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. * * *

Without vigilant protection of a private space in which each citizen is free to pursue his own ideas and aspirations, we would betray our vision of a society based on the dignity of the individual.

The question presented by this case is when may these constitutional rights be overborne by the Executive to

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[45] *See Givhan v. Western Line Consolidated School District*, —— U.S. ——, ——, 47 U.S. L. WEEK 4102, 4104 (Jan. 9, 1979) (First Amendment rights not lost because communication is private rather than public).

[46] *See Berger v. New York*, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."); *Katz v. United States*, 389 U.S. 347 (1967); *Keith*, *supra* note 42.

[47] *See* 18 U.S.C. §§ 2511-2520 (1976) (Title III); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 STAT. 1783.

[48] 116 U.S. 616, 630 (1886).

protect the security of the entire nation. Unfortunately, the inherent vagueness of the term "national security" hampers careful analysis.[49] All would agree that the term includes situations where the very existence of the Government is in jeopardy, but consensus may break down beyond such clear instances.

The Supreme Court has taken an extremely narrow view of the circumstances in which the Executive may exercise extraordinary powers under the Constitution. In *Mitchell v. Harmony*[50] the Court restricted the military's power to convert to its own use private property in a theatre of war.

> [T]he danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for * * *. * * *[51]

This attitude was echoed in decisions striking down martial law in Indiana in 1864[52] and in Hawaii in 1943.[53] In both cases the Supreme Court ruled that normal judicial processes may be superseded only when "foreign invasion" or "civil war" physically close the courthouses.[54] Similarly, in *Youngstown Sheet & Tube*

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[49] *See Keith, supra* note 42, 407 U.S. at 314 ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' "); *id.* at 320 ("inherent vagueness of the domestic security concept"); *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594, 653-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[50] 54 U.S. (13 How.) 115 (1851).

[51] *Id.* at 134.

[52] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[53] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[54] *Id.* at 326 (Murphy, J., concurring); *Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 127.

Co. v. Sawyer[55] the Court found no basis in the Constitution for the President's seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.[56] Justice Jackson observed on that occasion that, because the drafters of the Constitution "suspected that emergency powers would tend to kindle emergencies," they "made no express provision for exercise of extraordinary authority because of a crisis."[57]

The Supreme Court's steadfast refusal to expand its view of emergency powers reflects an appreciation of the consequences of any national security exception to the usual constitutional limits on Executive conduct. The Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security interests may be affected by fluctuations in international trade and the supply of natural resources, by social unrest at home and abroad, and by public disclosure of policy deliberations. But such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights.

We believe, therefore, that whatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation. Absent such exigent circumstances, there can be no appeal to powers beyond those enumerated in the

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[55] 343 U.S. 579 (1952).

[56] *Id.* at 587 (Black, J.) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

[57] *Id.* at 650 (Jackson, J., concurring). *See also New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *Zweibon I*, *supra* note 49, 516 F.2d at 635 n.107.

Constitution or provided by law.[58] Any security from one danger purchased with our individual rights would be but an illusion, for its price would be those protections against all other threats to our liberty.

III. Title III and the Fourth Amendment

Standards for evaluating the legality of this electronc surveillance derive from the Constitution and from Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[59] The Government has conceded that the Fourth

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[58] *See Zweibon I, supra* note 49, 516 F.2d at 649-650; 18 U.S.C. § 2518(7) (1976). *See also Ex parte Milligan, supra* note 52, 71 U.S. (4 Wall.) at 120-121.

[59] We are not concerned over the justiciability of this case. Although the Constitution exclusively commits the resolution of some questions to the Executive or Legislative Branches, here we are called on to determine whether electronic surveillance was consonant with statutory and constitutional strictures, a traditional judicial function that is governed by well established and manageable standards. *See* L. Tribe, American Constitutional Law 73 (1978). Decision of these appeals requires no initial policy decisions on how best to deal with the problem of Government leaks; nor need it entail any embarrassment to the Executive. Our course is reinforced by the Supreme Court's decision in *Keith, supra* note 42, which involved "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval." 407 U.S. at 299. There the Court proceeded immediately to resolution of the merits, rejected the contention that national security wiretaps involve factors "beyond the competence of courts to evaluate," *id.* at 319; *see Zweibon I, supra* note 49, at 641-647, and declined to carve out a national security exception to the warrant requirement of the Fourth Amendment.

Our duty to decide this case is not diminished because we deal with the President's foreign affairs power. The Supreme Court explicitly stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial

Amendment's ban on *unreasonable* searches and seizures applied to national security wiretaps in 1969,[60] but disputes the application of the Amendment's judicial warrant requirement.[61] The *Keith* Court observed that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause," [62] but warrantless searches have been approved in "certain carefully defined classes of cases." [63] Thus we must acknowledge that the Fourth Amendment's warrant require-

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cognizance." *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution"). Of course, the Executive's determination that national security was threatened in a particular situation is entitled to deference, *see United States v. Nixon*, 418 U.S. 683, 711-712 (1974), but "[E]xecutive action is not proof of its own necessity." *Duncan v. Kahanamoku*, *supra* note 53, 327 U.S. at 336 (Stone, C.J., concurring).

[60] Indeed, that was the Government's argument to this court in *Zweibon I*, *supra* note 49, 516 F.2d at 628.

[61] *Keith*, *supra* note 42, 407 U.S. at 314-321; *Zweibon I*, *supra* note 49, 516 F.2d at 613-614. *Keith* involved a "domestic security" threat posed by an American citizen suspected of planning disruptive actions, such as bombing, while *Zweibon I* concerned a "foreign security" danger resulting from anti-Soviet activities by the Jewish Defense League that might provoke Russian retaliation. *Keith* was a unanimous ruling, and six of the eight judges participating in *Zweibon I* agreed that the Fourth Amendment warrant requirement applied to that surveillance. The other two judges in *Zweibon I* would not have reached the Fourth Amendment issue in that case.

[62] *Keith*, *supra* note 42, 407 U.S. at 315.

[63] *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). *See, e.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (search of federally regulated liquor dealer); *Chimel v. California*, 395 U.S. 752, 763 (1969) (arresting officers may search area "within [the] immediate control" of suspect); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (incipient crime).

ment may not always apply, while a reasonableness standard may vary in different situations.[64] In contrast, Title III bans most electronic surveillance and specifies procedures for wiretapping and eavesdropping in particular situations; but the statute expressly does not limit the President's constitutional power to wiretap in national security situations.[65] Although the mandate of the statute is more precise, the reach of the constitutional provision may be seen as greater.[66]

To gauge the propriety of the Halperin surveillance under the overlapping constitutional and statutory stand-

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[64] *See Scott v. United States*, 436 U.S. 128, 139 (1978) ("Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."); *Keith*, *supra* note 42, 407 U.S. at 314 ("the Fourth Amendment is not absolute in its terms").

[65] The plurality opinion in *Zweibon I*, *supra* note 49, 516 F.2d at 659-670, concluded that although Title III did not affect presidential wiretapping *powers* in national security situations, some of the procedural and remedial provisions of the statute were relevant to unconstitutional surveillances in such instances. But our decision today in *Zweibon v. Mitchell* (*Zweibon III*), —— F.2d ——, —— (D.C. Cir. No. 78-1348, decided July 12, 1979) (slip op. text at notes 52-60), restricts that particular conclusion to prospective effect. Since this case involves events from 1969 until 1971, only the constitutional procedures and remedies are relevant here.

[66] Last year Congress enacted additional legislation explicitly covering national security surveillance involving foreign policy problems, Foreign Intelligence Surveillance Act of 1978, *supra* note 47, and repealing § 2511(3) of Title III, the pivotal statutory provision in this case. The 1978 statute does not control this case, however. That law expressly does not apply to surveillances that are terminated no more than 90 days after the Chief Justice designates the first judge to sit on a special court to review warrant applications under the new law. Foreign Intelligence Surveillance Act of 1978, 92 STAT. 1798, § 301.

ards, we must review the circumstances of the wiretapping and its connection to reasonable national security concerns.[67] If that connection is remote, or the supposed national security concerns ephemeral, we must remand to the District Court for a determination whether Title III should be applied: where the professed national security issues appear valid, we must still insist on compliance with the Fourth Amendment. We will first consider the applicability of Title III and then examine the requirements of the Fourth Amendment.

A

Title III was designed to limit Government use of electronic surveillance techniques. According to the Supreme Court, the statute and legislative history "evince[] the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." [68] This court has observed

[67] That this relationship may be somewhat distant was conceded by defendant Kissinger in testimony before the Senate Foreign Relations Committee:

> [W]hen one is new in Government, leaks take on an extraordinary significance, because one has a sort of a tendency to think that a top secret paper is inviolate * * *. * * *
>
> One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view. * * *

Kissinger Hearings, *supra* note 11, at 323.

[68] *United States v. Giordano*, 416 U.S. 505, 515 (1974). *See Alderman v. United States*, 394 U.S. 165, 175 (1969) ("The general rule under [Title III] is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant."); *United States v. Jones*, 542 F.2d 661, 671 (6th Cir. 1976) ("the pervasive theme of Title III [is] that electronic surveillance should be sharply curtailed and in no

that "[t]he Act's essential purpose * * * was to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur." [69]

The statute is straightforward. Section 2511 bans all electronic surveillance not authorized by Title III, with three exceptions not relevant to this case.[70] Surveillance is permitted for investigation of "classes of crimes carefully specified in 18 U.S.C. § 2516," [71] so long as stringent procedural requirements are satisfied.[72] The statute pro-

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instance be undertaken without strict judicial authorization and supervision"); S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968).

[69] *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

[70] Those exceptions involve wiretapping by communications common carriers for billing and maintenance purposes, 18 U.S.C. § 2511(2)(a)(i) (1976), by the Federal Communications Commission in its regulatory capacity, *id.* § 2511(2)(b), and by prior consent of a party, *id.* § 2511(2)(c).

[71] *Keith*, *supra* note 42, 407 U.S. at 301-302. Among the crimes for which surveillance under Title III may be authorized are espionage, sabotage, treason, labor racketeering, murder, kidnapping, robbery, extortion, bribery of public officials, obstruction of justice, gambling, and drug trafficking. 18 U.S.C. § 2516 (1976).

[72] The warrant application must include "a full and complete statement of the facts and circumstances" showing the need for the wiretap or eavesdropping, 18 U.S.C. § 2518(1)(b) (1976), an explanation of why other investigative procedures either have not been successful or are not appropriate, *id.* § 2518(1)(c) and an estimate of the period of surveillance, *id.* § 2518(1)(d). Government agents must minimize the intrusiveness of the surveillance and no warrant can extend for longer than 30 days. *Id.* § 2518(5). Finally, after the wiretapping or eavesdropping is terminated, all identifiable persons whose communications have been intercepted

vides for civil as well as criminal prosecution of violators, with minimum civil damages set at $100 for each day of violation, plus punitive damages and attorney's fees.[73] A good faith defense is available to Government officials sued under Title III, as we discuss in detail in Part IV of this opinion.

The applicability of Title III to the Halperin wiretap hinges on Section 2511(3), which enumerates five national security situations in which surveillance would not be covered by the statute. This provision, as the *Keith* Court held, is an "expression of congressional neutrality" on national security surveillances:

> [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security. * * *[74]

Hence, if a surveillance falls under Section 2511(3), it is still subject to constitutional limitations, but not to Title III's requirements and prohibitions.

Only one of the five circumstances listed in Section 2511(3) might apply to this case: That nothing in Title III "shall limit the constitutional power of the President * * * to protect national security information against foreign intelligence activities."[75] We face an

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must be notified of the surveillance unless the investigators show good cause not to do so. *Id.* § 2518(8)(d).

[73] *Id.* § 2520.

[74] *Keith*, *supra* note 42, 407 U.S. at 308 (emphasis in original).

[75] The other four circumstances are protection against "actual or potential attack or other hostile acts of a foreign power," obtaining "foreign intelligence information deemed essential to the security of the United States," and protection against either "overthrow of the Government by force or other unlawful means," or any other clear and present danger

initial problem in applying this provision to the instant case, since there was never any allegation that the Halperins were directly connected to "foreign intelligence activities." Although it is surely possible for vital secrets to be revealed through a leak to the press, both courts and Congress have looked for a direct link between the wiretap target and a foreign interest as a justification for surveillance.[76] In the absence of such a connection,

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to the structure or existence of the Government." 18 U.S.C. § 2511(3) (1976).

[76] *See, e.g., Keith, supra* note 42, 407 U.S. at 309 ("There is no evidence of any involvement, directly or indirectly, of a foreign power."); *Zweibon I, supra* note 49, 516 F.2d at 655 (no Executive power for warrantless wiretapping "at least where the subject of the surveillance is a domestic organization that is not the agent of or acting in collaboration with a foreign power"); S. Rep. No. 1097, *supra* note 68, at 94 (discussing § 2511(3) in context of foreign security threats: cites members of Communist Party of the United States as "instruments of the foreign policy of a foreign power" and notes problem of "agents of foreign powers and those who cooperate with them"). The Foreign Intelligence Surveillance Act of 1978, *supra* note 47, specifies procedures for wiretapping and eavesdropping of "agents of a foreign power" and participants in terrorist acts. *Id.* § 101(b) & (c). The following striking passage appears in the House report on that legislation:

> It should be clear from the foregoing, but for the sake of explicitness the committee wishes to make perfectly clear, that *surveillance would not be authorized under this*, or any other definition of agent of a foreign power *against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people.* * * *

H.R. Rep. No. 95-1283, Part I, 95th Cong., 2d Sess. 40 (1978) (emphasis added).

we must closely scrutinize the validity of the national security rationale.[77]

The District Court declined to apply Title III because of "the indisputable difficulties and ambiguities presented by § 2511(3)."

> In view of the confused state of the law and the 30-year history of similar [warrantless national security wiretaps] * * *, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. * * *[78]

This statement conflates the standards for a good faith defense with the applicability of Title III,[79] and reflects a fundamental misapprehension of the Halperins' position. They argue that the wiretap was not related to national security, and thus was subject to the substantive and procedural terms of Title III. If they are correct in their first contention, the second is incontestable. The "30-year history" of warrantless national security wiretaps could not affect the applicablity of Title III to non-national security surveillances. Consequently, the proper inquiry for the District Court was whether the surveillance challenged here was a valid national security action.[80] To the extent that it was not, any uncertainty

[77] In view of the well-documented practice of classifying as confidential much relatively innocuous or noncritical information, *see* H.R. Rep. No. 93-221, 93d Cong., 1st Sess. 100 (1973), we cannot conclude automatically that revelation of all "top secret" documents will endanger national security. *See* note 67 *supra*; *see also New York Times Co. v. United States*, *supra note* 57, 403 U.S. at 719 (Black, J.).

[78] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 842.

[79] For discussion of good faith defense and absolute immunity issues, *see* Part IV *infra*.

[80] *See Burkhart v. Saxbe*, 397 F.Supp. 499, 504 (E.D. Pa. 1976).

about the meaning of Section 2511(3) at the time of the wiretapping would be relevant only to the question of the defendants' official immunity to suit. As a result, we must reverse the grant of summary judgment on the statutory claim and remand for a determination by the District Court of whether the surveillance was reasonably intended to guard national security data from foreign intelligence agencies.

In this framework we see little evidence before us for classifying the surveillance from May 1970 to February 1971 as a national security action not reached by Title III. During those nine months Halperin had no official connection with the Government, and, in fact, had lacked access to much classified information for the preceding year;[81] a continuous, year-long wiretap had revealed no evidence that he was a leaker; and the reports on the wiretap were not sent to Kissinger, the President's National Security Adviser, but to Haldeman, a political and administrative adviser. Moreover, since Halperin had almost no official contact with the National Security Council from September 1969 to May 1970, the national security basis for surveillance during those nine months would seem almost equally attenuated. Finally, plaintiffs have raised questions about the purported national security nexus even at the beginning of the wiretap. Halperin claims that the surveillance was initiated for political reasons stemming from his connection to previous

[81] The Government argues that since much of the information Halperin had access to in his previous jobs remained classified after he left the Government, he was still a potential leaker. Passing by the problem of overclassification of documents, *see* note 77 *supra*, we think this argument proves too much. It would justify surveillance of thousands of former federal employees without any further indication of security threat.

administrations.[82] He points to letters from Senator Goldwater to President Nixon and to Attorney General Mitchell recommending his ouster,[83] as well as to Kissinger's apparent request on June 4, 1969 that the surveillance be continued to establish "a pattern of innocence."[84] These events suggest, Halperin argues, that he was initially targeted for surveillance in order to bolster within the Nixon Administration the political credibility of Kissinger's staff appointments.

On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry. Summary proceedings should be limited to those instances where the record before the court indicates no such issue.[85]

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[82] *See* note 15 *supra*. The second impeachment article approved by the House Judiciary Committee charged President Nixon with abusing the rights of private citizens by authorizing "Electronic Surveillance or Other Investigations for Purposes Unrelated to National Security, the Enforcement of Laws, or Any Other Lawful Function of His Office." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). The Committee added in explanation that Nixon "falsely used a national security pretext to attempt to justify" improper surveillances. *Id.* The Committee also squarely concluded that the May 1969 wiretaps, including Halperin's, were established for "political purposes." *Id.* at 35.

[83] JA 35-37.

[84] Memorandum from A. Haig to H. Kissinger (June 4, 1969), JA 57.

[85] Rule 56 of the Federal Rules of Civil Procedure directs that a motion for summary judgment must be granted if the materials submitted to the court "show that there is no genuine issue as to any material fact and that the moving

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Throughout the 21 months of the Halperin wiretap the defendants in this case were under an obligation to comply with both the reasonableness and the warrant requirements of the Fourth Amendment. The District Court found that at some point during the surveillance the wiretap

> developed into a dragnet which lacked temporal and spatial limitation. It represent[ed] the antithesis of the "particular, precise, and discriminate" procedures required by the Supreme Court in numerous Fourth Amendment cases. * * *[86]

Although we agree that the surveillance did not satisfy the reasonableness standard, we must remand for consideration both of the warrant question and of *when* the wiretap became unreasonable. In addition, we cannot affirm the award of $1 nominal damages for the constitutional violations established here.

1. When the Supreme Court first applied the warrant provision of the Fourth Amendment to wiretapping in 1967, it expressly reserved the question of prior ju-

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party is entitled to a judgment as a matter of law." *See Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977); *Askew v. Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976). *See also* text at notes 113-118 *infra*.

In view of the extensive discovery that has taken place in this case, the District Court may well be able to resolve remanded questions without reopening the record. It remains in the court's discretion, naturally, to receive additional submissions as necessary.

[86] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 843 (*citing Osborn v. United States*, 385 U.S. 323, 329-330 (1966); *Berger v. New York*, *supra* note 46, 388 U.S. at 55-60; *Katz v. United States*, *supra* note 46, 389 U.S. at 354-357)).

dicial approval of national security surveillances.[87] In *Keith*, however, the Court found that a warrant was necessary before a domestic target deemed a threat to national security could be wiretapped, and in *Zweibon I* this court ruled that a warrant was needed to wiretap a domestic group that may be concerned with foreign affairs but "that is not the agent of or acting in collaboration with a foreign power * * *."[88] At the root of these decisions was the conviction that prior judicial approval of wiretapping for national security matters, absent exigent circumstances, falls within the competence of the judiciary,[89] poses no additional threat to national security,[90] and provides a valuable check on Executive discretion.[91]

For the reasons articulated in our opinion today in *Zweibon v. Mitchell* (*Zweibon III*),[92] we conclude that a warrant was required for the Halperin wiretap in May 1969. The reasoning of both *Keith* and *Zweibon I*, which dealt with wiretaps initiated during the same period, applies with equal force to this situation, and there is no basis for limiting those cases to prospective effect. The District Court in the instant case "[a]ssum[ed]

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[87] *Katz v. United States*, *supra* note 46, 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

[88] *Zweibon I*, *supra* note 49, 516 F.2d at 655.

[89] *Keith*, *supra* note 42, 407 U.S. at 320; *Zweibon I*, *supra* note 49, 516 F.2d at 641-647.

[90] *Keith*, *supra* note 42, 407 U.S. at 320-321; *Zweibon I*, *supra* note 49, 516 F.2d at 647-648.

[91] *Keith*, *supra* note 42, 407 U.S. at 316-317; *Zweibon I*, *supra* note 49, 516 F.2d at 633-636.

[92] —— F.2d —— (D.C. Cir. No. 78-1348, decided July 12, 1979).

arguendo" that defendants were not subject to the warrant requirement, although it is not clear from that opinion whether the assumption was based on retroactivity considerations or defendants' possible immunity from suit.[93] In any event, such an assumption for purposes of argument is no substitute for a specific holding by the District Court. Of course, the defendants may be able to make out an immunity defense by arguing that due to uncertainty in the law on the warrant requirement there were reasonable grounds in 1969 for their failure to acquire a warrant, and that they did not act in bad faith.[94] This is a distinct question, however, from whether the Fourth Amendment mandated a warrant.

2. As we discussed above, we believe that Title III most likely should apply to at least part of the period of the Halperin surveillance. Nevertheless, for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns, the wiretap might still have violated the Fourth Amendment's reasonableness standard.[95] The duration or conduct of the surveillance might well be deemed to have been unreasonable in view of the likely product of the wiretap, especially after the initial period. In that event, the trial court would have to establish the time span of that constitutional violation in order to determine damages.[96]

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[93] *See Halperin v. Kissinger, supra* note 4, 424 F.Supp. at 842-843.

[94] *See* Part IV *infra*.

[95] The constitutional remedy would be relevant only if the more specific procedures and remedies of Title III were not applicable. Of course, the constitutional and statutory remedies could not be granted simultaneously.

[96] Although the plurality in *Zweibon I*, *supra* note 49, found that some of the procedures and the civil damages provision

3. Damage suits for the vindication of individual rights date from the eighteenth century in England,[97] and have been widely recognized in our courts.[98] The Supreme Court stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[99] The instant suit is squarely within this tradition, and the Halperins are "entitled to recover money damages for any injuries [they have] suffered as a result of the * * * violation of the [Fourth] Amendment."[100]

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of Ttitle III should apply to unconstitutional wiretaps in national security situations, our ruling in *Zweibon III*, *supra* note 65, restricts that position to prospective effect. As a result, the District Court in this case will have to consider compensatory damages for any unconstitutional surveillance. *See also* note 106 *infra*.

[97] *See Entick v. Carrington*, 95 Eng. Rep. 807, 19 How. St. Tr. 1030 (1765) (unlawful search by King's officers); *Wilkes v. Wood*, 98 Eng. Rep. 489, 19 How. St. Tr. 1075 (1763) (same).

[98] *See, e.g., Nixon v. Condon*, 286 U.S. 73 (1932) (recognizing damage remedy in civil suit alleging wrongful denial of right to vote); *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919) (same).

[99] 403 U.S. 388, 395 (1971). In Justice Harlan's pithy phrase, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

[100] *Id.* at 397. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court ruled that in the absence of proof of injury plaintiffs alleging violation of procedural due process rights may win only nominal damages. We think that holding does not require a similar award to the Halperins for two reasons. First, the Court emphasized that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-265. The due process issue

Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate. In *Paton v. LaPrade* the Third Circuit enumerated many of the intangible injuries that might have been suffered by a student unreasonably investigated by the FBI: "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." [101] This approach has been followed by other circuits in suits alleging constitutional violations by state officials under 28 U.S.C. § 1983 (1976).[102]

Due to the plaintiffs' reliance on a "presumption" of injury in requesting a damage award, the District Court concluded that there was "no demonstrable injury." [103]

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in *Piphus* concerned a student's right to a pre-suspension hearing, so it would indeed have been difficult to estimate the plaintiff's injury unless he could have shown that he would not have been suspended if a hearing had been held. The substantive rights asserted by the Halperins are of a much different character, as is evident from the traditional damage remedy for unlawful search marked by the English cases of *Entick* and *Wilkes*, *supra* note 97, and our *Bivens* doctrine. *See Carey v. Piphus*, *supra*, 435 U.S. at 264-265 (distinguishing cases involving "denial of Fourth Amendment rights"). Second, the Supreme Court ruled that the plaintiff in *Piphus* might still prove actual injury but simply could not claim a presumption of injury. *Id.* at 262-264. To the extent that the plaintiffs here can establish actual though intangible injury, damages would clearly be appropriate even under *Piphus*.

[101] 524 F.2d 862, 871 (3d Cir. 1975). Because it involved First Amendment and privacy rights, *id.* at 869-870, *Paton* is not limited by the Supreme Court's *Piphus* ruling. *See* note 100 *supra*.

[102] *See, e.g., Seaton v. Sky Realty Co.*, 491 F.2d 634, 636-638 (7th Cir. 1974); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970).

[103] *Halperin v. Kissinger*, *supra* note 5, 434 F.Supp. at 1195. Plaintiffs attribute their course to a pre-*Piphus* belief that

We think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be "inferred from the circumstances," [104] and if established would surely entitle the Halperins to more than nominal recovery. This court has held that in cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." [105] Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts." [106]

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injury should be presumed, based on the lower court rulings in *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976), and *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). *See* note 100 *supra*. We see no reason why, on remand, they should not be permitted to amend their pleadings and attempt to demonstrate injury.

[104] *Seaton v. Sky Realty Co.*, *supra* note 102, 491 F.2d at 637-638.

[105] *Tatum v. Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977) (First Amendment claim).

[106] *Id.* at 1287 (Wilkey, J., concurring). Although not directly controlling for Fourth Amendment violations, *see* note 65 *supra*, it is certainly illuminating that Congress in Title III identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976). One would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions.

IV. The Immunity Defense

All individual defendants claim an absolute immunity from civil damage suits for actions undertaken in their official capacities. The District Court rejected these claims, and we agree with that ruling. Defendants, including former President Nixon, are entitled to a qualified immunity on both the Fourth Amendment and the Title III claims if they can show that they had reasonable grounds for believing their actions were legal (the "objective" basis) and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping (the "subjective" basis).[107] Because former President Nixon advances particular arguments in support of his own absolute immunity, we will consider his status separately.

A

Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions. This doctrine assumes that the initiation of a prosecution and the resolution of a dispute are especially likely to incite individualized wrath,[108] and that the review processes of the judicial system provide an automatic safeguard against improper actions.[109] Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution.[110]

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[107] *See Zweibon I*, *supra* note 49, 516 F.2d at 670-673.

[108] *Butz v. Economou*, 438 U.S. 478, 509-510, 512 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 424-426 (1976).

[109] *Butz v. Economou*, *supra* note 108, 438 U.S. at 512; *Imbler v. Pachtman*, *supra* note 107, 424 U.S. at 427; *see also Pierson v. Ray*, 386 U.S. 547, 554 (1967). *See generally Stump v. Sparkman*, 435 U.S. 349 (1978).

[110] Although defendant Mitchell might be entitled to prosecutorial immunity for some of his actions as Attorney General, this is not such a case since there is no allegation that the

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court outlined two bases for qualifying the immunity from suit enjoyed by Executive officials: (1) without such qualification the damage actions contemplated by *Bivens* would be "drained of meaning" and many constitutional violations would go unremedied;[111] and (2) since state officials may be held liable for such violations,[112] it would "stand the constitutional design on its head" if the courts established "a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials * * *."[113]

The *Economou* Court adopted for federal officials the objective and subjective standards for qualified immunity of *Wood v. Strickland*:[114]

> [An official is] not immune * * * [A] if he knew or reasonably should have known that the action he took * * * would violate the constitutional rights of the [person] affected, or [B] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *. * * *

We stress that only one of these two standards need be satisfied in order for a defendant to lose his immunity from suit.[115]

Halperin surveillance was part of a criminal prosecution. *See Forsyth v. Kleindienst*, —— F.2d ——, —— (3d Cir. No. 78-1611, decided May 22, 1979) (slip op. at 21-22); *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

[111] 438 U.S. at 501.

[112] *See* 28 U.S.C. § 1983 (1976).

[113] *Butz v. Economou*, *supra* note 108, 438 U.S. at 504.

[114] 420 U.S. 308, 322 (1975). *See Procunier v. Navarette*, 434 U.S. 555, 562, 565-566 (1978); *Pierson v. Ray*, *supra* note 109, 386 U.S. at 557.

[115] We follow the holding in *Zweibon I*, *supra* note 49, 516 F.2d at 670-671, that the good faith defense specified in § 2520 of Title III, 18 U.S.C. § 2520 (1976), is the same as in

To reduce the potential for harassment of Executive officials, the Supreme Court has recommended resolution of the immunity issue, when possible, on summary judgment.[116] This course is best suited for handling the objective basis for qualified immunity. Courts should be able to determine at the pretrial stage whether there is a genuine issue of material fact as to the reasonableness of a defendant's belief that he was acting legally. On the subjective criterion—which "turns on officials' knowledge and good faith belief" [117]—summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved.[118] Nevertheless, in view of the Supreme Court's emphasis on the importance of summary procedures in suits like this one, District Courts must carefully examine any pretrial claim by a defendant that a plaintiff has not raised a genuine issue of material fact as to defendant's subjective good faith.[119] Should the

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constitutional cases. Because Judge Robb concurred in the plurality's position on this point, 516 F.2d at 688, that holding was reached by a majority of this court.

[116] *Butz v. Economou, supra* note 108, 438 U.S. at 508.

[117] *Apton v. Wilson, supra* note 110, 506 F.2d at 95.

[118] *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (summary judgment "should be used sparingly * * * where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). For application of this principle to cases involving constitutional claims, *see* cases cited in note 85 *supra*. *See also Palon v. LaPrade, supra* note 101, 524 F.2d at 872; *Abramson v. Mitchell*, 459 F.2d 955 (8th Cir. 1972).

[119] A formulation of the summary judgment standard in a similar context was offered by the Seventh Circuit in *Askew v. Bloemker, supra* note 85, 548 F.2d 679, involving a suit against state officials for violation of Fourth Amendment rights:

[continued]

court conclude on the record before it that the defendant is not entitled to a judgment as a matter of law,[120] the court must move beyond summary procedures.[121] At trial

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Plaintiffs are entitled to take to the jury the state-of-mind defense on which the defendants herein rely as long as plaintiffs have adduced specific facts from which a reasonable man, viewing all the evidence in the light most favorable to plaintiffs and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting * * * in bad faith * * *.

Of course, at the pleading stage plaintiffs must allege that the defendants acted with "malicious intention" in order to proceed with a claim that immunity should be denied on the subjective criterion. *Procunier v. Navarette, supra* note 114, 434 U.S. at 561.

[120] Since pretrial discovery has concluded in this case, *see* note 85 *supra*, we do not attempt to sketch comprehensive standards guiding the discretion of District Judges faced with requests to permit detailed discovery of the mental processes and confidential discussions of Executive decision-makers. We advert to the problem only because we believe close control of discovery in suits against such officials is essential to the preservation of meaningful official immunity. *See United States v. Nixon, supra* note 59, 418 U.S. at 703-713 (recognizing a presumptive privilege for confidential conversations between a President and his close advisors, but finding that general interest to be overborne by a specific showing of need for such evidence in a pending criminal trial); *United States v. Reynolds*, 345 U.S. 1, 6-12 (1953) (military secrets); *cf. United States v. Morgan*, 313 U.S. 409, 422 (1941) (mental processes of administrative decision-makers). Where a showing of need has prevailed over a broad claim of privilege, a District Court might be well advised to require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high-level officials.

[121] *Apton v. Wilson, supra* note 110, 506 F.2d at 94-95. Judge Gesell in his concurrence has highlighted the central problem posed by the post-*Ecqnomou* immunity doctrine: How to make effective the use of summary procedures in preventing harassment of Executive officials. We believe that the approach

defendants would have to establish their subjective good faith as an affirmative defense.[122]

As to defendants Mitchell and Haldeman, the District Court found "their activities relating to the wiretap *continuance* unreasonable." [123] On the subjective claim, the court noted:

> The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.[124]

The District Court also applied the objective standard, finding that the defendants violated the Fourth Amendment, and, "[l]ike any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct." [125]

We find no basis for disturbing these rulings. Certainly there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution, and the record contains ample support for the trial court's ruling on bad faith. Under the terms of our remand, however, the District Court will also have to consider any claim by defendants that they are immune

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we take here conforms with the requirements of Rule 56 of the Federal Rules of Civil Procedure, and with the concerns of the *Economou* Court for the interests of both potential plaintiffs and potential defendants.

[122] *See Zweibon I*, *supra* note 49, 516 F.2d at 607 n.18.

[123] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 845 (emphasis added).

[124] *Id.*

[125] *Id.*

from liability for their failure to acquire a warrant for the wiretap, a question which the District Court has not directly addressed.[126] In a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act.

B

In order to accept defendant Nixon's argument that he, as a former President, is absolutely immune from this suit, we would have to hold that his status as President sets him apart from the other high Executive officials named as defendants to this action. Such a distinction would have to rest on a determination either that the Constitution impliedly exempts the President from all liability in cases like this or that the repercussions of finding liability would be drastically adverse. Because we are unable to make that distinction, we do not believe he is entitled to absolute immunity to a damage action by a citizen subjected to an unconstitutional or illegal wiretap.

1. The constitutional scheme betrays no indication that any kind of immunity was intended for the President or the Executive Branch. While congressmen enjoy the privileges of the Speech and Debate Clause of Article I,[127]

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[126] On the District Court's treatment of the Fourth Amendment warrant requirement, *see* p. 28 *supra*. In addition, the warrant provision of Title III might also be relevant to this case if the District Court determines on remand that there was no national security basis for the initiation of the wiretap. *See* p. 25 *supra*.

[127] U.S. CONST., Art. I, § 6, cl. 1.

> [t]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. * * *[128]

In addition, there are indications that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any.[129] The Convention did specify, however, that an impeached President may still be tried in the courts for any offense.[130]

> By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency

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[128] *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (*en banc*).

[129] At one point in the Convention's deliberations, James Madison suggested "the necessity of considering what privileges ought to be allowed to the Executive," 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 503 (1911), but the proposal was not taken up. Charles Pinckney, who was intimately involved in consideration of the privileges question, *see id.* at 502; 3 *id.* at 605-606, explained to the United States Senate in 1800 why Madison's suggestion went unheeded:

> . . . Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned [speech and debate] for Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

3 *id.* at 385.

[130] U.S. CONST., Art. 1, § 3, cl. 7.

> does not relieve the President of the routine legal obligations that confine all citizens. * * *[131]

2. The doctrine of separation of powers wisely counsels the judiciary to act with care when reviewing actions by other branches, but the courts may not evade their constitutional responsibility to delineate the obligations and powers of each branch. Thus, although courts lack power to grant injunctive relief against prospective presidential actions that may be discretionary,[132] Presidents are scarcely immune from judicial process. Courts have intervened in defense of congressional lawmaking prerogatives to block improper presidential exercise of emergency powers[133] and to assert the President's duty to execute mandatory legislative instructions.[134] They have also ordered production of presidential documents needed for orderly functioning of the criminal justice system.[135] Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from

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[131] *Nixon v. Sirica*, *supra* note 128, 487 F.2d at 711. In *United States v. Nixon*, *supra* note 59, the Supreme Court acknowledged a limited Executive privilege of confidentiality, 418 U.S. at 706-707, but that conclusion was based on practical considerations of government, not constitutional text. We review the likely practical effect of our ruling today in text at notes 137-141 *infra*.

[132] *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); *see also Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

[133] *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* note 55.

[134] *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

[135] *United States v. Nixon*, *supra* note 59.

each other.[136] Such an abdication of the judicial role would sap the vitality of the constitutional rights whose protection is entrusted to the judiciary.

3. We also find no basis for absolute presidential immunity on what might be termed prudential grounds. We do not believe that any inhibiting effect such suits might have on the presidential will to act should hinder effective governance of the nation. To some extent, of course, the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights. We believe, however, that suits that may successfully be pursued against a President will be quite rare.[137] And if we are serious about providing a

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[136] *See Youngstown Sheet & Tube Co. v. Sawyer*, *supra* note 55, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). *See also id.* at 610 (Frankfurter, J., concurring). Judge McGowan has articulated an approach to separation of powers questions that respects both the separateness and the interdependence of the three branches:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. * * *

Nixon v. Administrator of General Services, 408 F.Supp. 321, 342 (D. D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

[137] *Cf. Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977) (permitting civil damage action for constitutional deprivation despite disruption of

remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for holding inferior officials liable for constitutional violations while immunizing those higher up.

> Indeed, the greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. * * *[138]

In addition, the doctrine of qualified immunity, as elaborated by the Supreme Court in *Scheuer v. Rhodes* and by this court in *Apton v. Wilson*, makes allowance for the additional demands on the time and attention of a Chief Executive.[139] The President, like all citizens, must be held to know the relevant law, but he "may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem." [140] This

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presidential confidentiality, partly because "the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled").

[138] *Butz v. Economou, supra* note 108, 438 U.S. at 506.

[139] *Scheuer v. Rhodes*, 416 U.S. 232, 247-249 (1974); *Apton v. Wilson, supra* note 110, 506 F.2d at 91-92. In *Scheuer v. Rhodes* the Supreme Court stressed the "virtually infinite" range of decisions and choices that may face a Chief Executive in a situation:

> [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. * * *

416 U.S. at 247. As this court has stated, such concerns "go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate." *Apton v. Wilson, supra* note 110, 506 F.2d at 93.

[140] *Apton v. Wilson, supra* note 110, 506 F.2d at 93.

sliding scale would apply with even greater force if the President were acting in an emergency situation. The President would lose his immunity only if plaintiffs could show that he acted with "actual malice" [141] or that he failed to meet a statutory or constitutional obligation that was clear under the circumstances as understood at the time.[142] Under this approach plaintiffs would have substantial difficulty in defeating a President's claim of immunity, an outcome that helps satisfy our concern that suits like this one would place major and unwarranted demands on a President's time. In considering the case to be made out by plaintiffs before trial,[143] District Courts should be sensitive to the extraordinary practical difficulties confronting a President who is charged in such a suit.[144]

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[141] *See Wood v. Strickland, supra* note 114, 420 U.S. at 321.

[142] *See Scheuer v. Rhodes, supra* note 139, 416 U.S. at 246-247.

[143] *See* text at notes 119-122 *supra*.

[144] Stressing the crucial importance to democratic government of independent lawmakers, the Supreme Court has recognized an absolute immunity for state and local legislators which parallels the protection afforded to federal lawmakers by the Speech and Debate Clause of the Constitution. Such immunity, the Court has said, spares the legislators the "cost and inconvenience and distractions" of a public trial, and protects them from speculation by a finder of fact as to their motives for legislative actions. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, —— U.S. ——, ——, 47 U.S. L. WEEK 4256, 4260 (March 6, 1979). Taken in the abstract, these considerations might seem to support absolute immunity for the President, or, indeed, for any Executive official. We do not, however, find them compelling here. *Scheuer v. Rhodes, supra* note 139, and *Butz v. Economou, supra* note 108, establish that high Executive officials in state or federal positions do not enjoy the same immunity as lawmakers do. Because no defensi-

4. We do not think that the personal burden on the President of having to answer civil suits like this one is so great as to justify absolute immunity. Like other Executive officials, he is represented by the Government if he is sued for his official actions,[145] and there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer.[146]

Finally, we think the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law. The President is the elected chief executive of our government, not an omniscient leader cloaked in mystical powers. This court has observed that "[s]overeignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." [147]

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ble distinction can be made between the President and other high Executive officers for immunity purposes, we find no basis for applying to the President the absolute immunity of legislators.

[145] 28 C.F.R. §§ 50.15-50.16 (1978). Representation may be denied if the Department of Justice determines "that it is not in the interest of the United States to represent the employee." *Id.* § 50.15(b)(4). *See also* 28 U.S.C. § 516 (1976).

[146] Legislation is currently pending in Congress that would provide a cause of action against the federal government for individuals harmed by officials acting in the course of duty. H.R. 193, 96th Cong., 1st Sess. (1979). A similar measure was the subject of hearings in the last Congress and was favorably reported by the subcommittee considering it. *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee*, 95th Cong., 2d Sess. (1978). By waiving sovereign immunity against *Bivens* suits, such legislation would divert litigation from individual officials.

[147] *Nixon v. Sirica*, *supra* note 128, 487 F.2d at 711.

The Supreme Court noted this truth in *Economou* when it quoted from *United States v. Lee*:[148]

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.[149]

V. KISSINGER'S SUMMARY JUDGMENT MOTION

The District Court granted summary judgment in favor of defendant Kissinger on the ground that he played an "inactive role" in the surveillance and lacked "oversight authority."[150] We think this ruling was error, since plaintiffs raised genuine issues of material fact as to Kissinger's role in the installation and maintenance of the wiretap.[151] They demonstrated that Kissinger was involved to some extent in the decision to initiate a surveillance program,[152] that he monitored the product of the surveillance for a full year,[153] and that on at least one occasion he directly requested continuation of the Halperin tap.[154]

We, of course, intimate no suggestion as to Kissinger's liability, but only hold that plaintiffs made a sufficient showing as to his supervisory role to survive a motion for summary judgment.

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[148] 106 U.S. (16 Otto) 196, 220 (1882).

[149] *Butz v. Economou*, *supra* note 108, 438 U.S. at 506.

[150] *Halperin v. Kissinger*, *supra* note 4, 424 F. Supp. at 846.

[151] For standards for summary judgment, see note 85 *supra*.

[152] *See* text at note 8 *supra*.

[153] That is, from May 1969 until May 1970. *See text* at notes 39-40 *supra*.

[154] *See* text at notes 24-27 *supra*.

Accordingly, the judgment of the District Court is reversed and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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SUPREME COURT OF THE UNITED STATES

No. 79-880

Henry Kissinger et al., Petitioners, *v.* Morton Halperin et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 22, 1981]

PER CURIAM.

The judgment with respect to petitioners Kissinger, Nixon and Mitchell is affirmed by an equally divided Court. With respect to petitioner Haldeman, the writ of certiorari is dismissed as improvidently granted.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

End memo Kissinger Case to Ass
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-2014

MORTON HALPERIN *et al.*, APPELLANTS

v.

HENRY KISSINGER *et al.*

No. 77-2015

MORTON HALPERIN *et al.*

v.

HENRY KISSINGER *et al.*
RICHARD M. NIXON, JOHN N. MITCHELL,
AND H. R. HALDEMAN, APPELLANTS

Appeal and Cross-Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 1187-73)

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Argued February 9, 1979

Decided July 12, 1979

Mark H. Lynch, with whom *John H. F. Shattuck* and *Jack Novik* were on the brief, for appellants in No. 77-2014.

Larry L. Gregg, Attorney, Department of Justice, for appellees in No. 77-2014 and cross-appellants in No. 77-2015. *John C. Keeney*, Acting Assistant Attorney General. *Robert L. Keuch*, Deputy Assistant Attorney General, and *George W. Calhoun* and *Lubomyr M. Jachnycky*, Attorneys, Department of Justice, were on the brief for appellees in No. 77-2014 and cross-appellants in No. 77-2015. *Benjamin C. Flannagan*, *D. Jeffrey Hirschberg*, and *Philip B. Heymann*, Attorneys, Department of Justice, also entered appearances for appellees in No. 77-2014 and cross-appellants in No. 77-2015.

Joseph E. Casey entered an appearance for appellee William Sullivan in Nos. 77-2014 and 77-2015.

James J. Bierbower entered an appearance for appellee Jeb Stuart Magruder in No. 77-2015.

Before WRIGHT, *Chief Judge*, ROBINSON, *Circuit Judge*, and GESELL,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Concurring opinion filed by *District Judge* GESELL.

WRIGHT, *Chief Judge*: Morton Halperin, a former member of the National Security Council (NSC) staff, and his family sued ten federal officials for money damages following revelations that their home telephone had been tapped by the Government from May 1969 until

* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

February 1971.[1] The Halperins alleged that the wiretap, which was installed during an investigation into public disclosures of confidential information,[2] was prohibited by both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[3] On cross-motions for summary judgment in December 1976 the District Court ruled in favor of all defendants except former President Richard M. Nixon, former Attorney General John N. Mitchell, and former presidential aide H. R. Haldeman.[4] The court concluded that Nixon, Mitchell, and Haldeman had violated the Halperins' Fourth Amendment rights, but not the terms of Title III. The Halperins were awarded $1 in nominal damages in August 1977.[5]

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[1] The defendants were President Richard Nixon, former Attorney General John Mitchell, National Security Adviser Henry Kissinger, presidential aides H. R. Haldeman, John Ehrlichman, Alexander Haig and Jeb Magruder, FBI Director Clarence Kelley and FBI official William Sullivan, and Assistant Attorney General Robert Mardian. The suit also named the Chesapeake & Potomac Telephone Company (C&P) as a defendant, but plaintiffs do not appeal the District Court's judgment in favor of C&P. Joining Halperin in the complaint were his wife, Ina, and their three minor children.

[2] The investigation eventually included electronic surveillance of 13 Government employees and four newspaper reporters, including the appellant in a case we also decide today, *Smith v. Nixon*, —— F.2d —— (D.C. Cir. No. 78-1526, decided July 12, 1979).

[3] Pub. L. No. 90-351, 82 STAT. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1976)).

[4] *Halperin v. Kissinger*, 424 F.Supp. 838 (D. D.C. 1976).

[5] *Halperin v. Kissinger*, 434 F.Supp. 1193 (D. D.C. 1977). If the court had found Title III applicable, plaintiffs would have been entitled to $100 in liquidated damages for each day of illegal wiretapping, plus punitive damages and attorney fees. *See* 18 U.S.C. § 2520 (1976).

Plaintiffs and defendants Nixon, Mitchell, and Haldeman appeal the decision.[6] The Halperins insist that the District Court erred in not applying Title III, in awarding only nominal damages, and in granting summary judgment in favor of former National Security Adviser Henry Kissinger. The defendants claim absolute immunity from this action and dispute the District Court's refusal to bar the suit on qualified immunity grounds. We affirm the District Court's conclusions on the immunity question, but reverse on the applicability of Title III, the proper measure of damages, and defendant Kissinger's motion for summary judgment. In addition, we believe that the District Court should have applied the warrant requirement for national security wiretaps as articulated in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972), and *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

I. The Wiretap

Shortly after taking office in 1969 President Nixon and his top advisers grew concerned over press disclosures of classified information.[7] In their view such "leaks" limited the Administration's flexibility in developing foreign policy and could have eroded the candor of foreign governments in dealings with this country. On April 25,

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[6] Because both sides appeal the decision of the District Court, it is easier to identify the parties by their status in the trial court, in order to avoid confusion among appellants, cross-appellants, and the like. We refer to the Halperins as plaintiffs and Nixon, Mitchell, Haldeman, and Kissinger as defendants.

[7] In response to interrogatories Kissinger listed 20 newspaper articles between February 3, 1969 and May 6, 1969 that in his opinion were based on leaked information. Joint Appendix (JA) 129-132.

1969 the President met in his office with Kissinger, Mitchell, and J. Edgar Hoover, the late Director of the Federal Bureau of Investigation (FBI), to discuss methods for controlling leaks. Mitchell, Hoover, and Nixon continued the discussion over dinner at Camp David that evening and developed a program, including wiretaps on private telephones, for investigation of suspected "leakers." [8] Both Mitchell and Hoover assured Nixon that the President could order such wiretapping without first obtaining a court order.[9] Three criteria were established at the meeting for identifying individuals to be investigated: (1) access to sensitive data that was being revealed publicly; (2) information in security files that "raised questions" about an individual; and (3) other incriminating information in FBI files.[10]

Over the next two weeks the appearance of several newspaper stories seemingly based on classified reports heightened the Administration's alarm over leaks.[11] The surveillance program was finally triggered by a *New York Times* article on May 9 revealing massive American

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[8] Nixon Deposition at 18-22, 25-26; Mitchell Deposition at 20-21.

[9] Mitchell Deposition at 76-79, 81-85; Nixon Deposition at 19-21.

[10] Nixon Deposition at 61; Kissinger Deposition at 28. On these facts the District Court concluded that President Nixon "authorized a program of electronic surveillance of individuals suspected of leaking information detrimental to the national defense and foreign policy of the United States." *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 840.

[11] *See Chronology of Events Relative to the Seventeen Wiretaps and Pertinent Documents*, in *Dr. Kissinger's Role in Wiretapping: Hearings Before the Senate Foreign Relations Committee*, 93d Cong., 2d Sess. 22-28 (1974) (hereinafter cited as *Kissinger Hearings*).

bombing of targets in Cambodia.[12] Nixon told Kissinger to ask the FBI to investigate the source for the story.[13] Although Halperin had no access to the information in the *Times* article,[14] FBI Director Hoover informed Kissinger that Halperin was the "prime suspect."[15] Hoover and Kissinger conferred by telephone four times that day,[16] and the wiretap on the Halperin home telephone was in place by evening.[17] Earlier that day, however, Kissinger had informed Halperin that he was considered a potential leaker, and the two men agreed that Halperin's access to classified information should be curtailed in

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[12] *Raids in Cambodia by U.S. Go Unprotested*, N.Y. Times, May 9, 1969, at 1, col. 3.

[13] Nixon Deposition at 23; Kissinger Deposition at 50.

[14] Halperin Affidavit (Nov. 12, 1973), JA 102.

[15] Kissinger Deposition at 48-49. Hoover alleged that Halperin had been a roommate of the reporter who wrote the story. *Id.* Two other items in Halperin's files were deemed to raise questions about his reliability: (1) failure to report in a 1966 Department of Defense form that he had stopped in Greece, Yugoslavia, and the Soviet Union on a previous round-the-world journey; and (2) incorrect identification of a Russian national with whom he lunched in 1967. JA 241-244; *see Kissinger Hearings*, *supra* note 11, at 182 (testimony of H. Kissinger) (blanks in testimony filled in by answers to interrogatories at JA 133). Halperin attributed the first omission to clerical oversight and the second to his error. JA 219-221. An internal FBI memorandum from Hoover identified Halperin as agreeing to a 1965 proposal for a national sit-in on the Vietnam War, as having subscribed to a Marxist publication, and as being a "so-called arrogant harvard-type [*sic*] Kennedy" man. JA 49-50. For a discussion of Halperin's allegation that he was singled out for surveillance for political reasons, *see* text accompanying notes 82-84 *infra*.

[16] *Chronology*, in *Kissinger Hearings*, *supra* note 11, at 23.

[17] *Id.* at 80 (testimony of J. Adams, Deputy Associate Director of FBI).

order to allay suspicions.[18] Three other private telephones were wiretapped in the attempt to find the source of the May 9 article.[19]

The following day FBI officials and Colonel Alexander Haig, Kissinger's assistant, worked out procedures to conduct the surveillance "with no record maintained" in normal FBI files.[20] The Bureau then formally requested wiretap authorization from the Attorney General. With respect to Halperin, the FBI memorandum stated only:

> Halperin, aged 30, was detailed from the Department of Defense to the National Security Council as a senior staff member on January 21, 1969. He was the subject of an applicant-type investigation by the Bureau. While admittedly he has had contact with Soviet nationals the investigation did not disclose at that time any pertinent derogatory information.[21]

Attorney General Mitchell approved the wiretap.[22]

The FBI agents conducting the surveillance compiled summaries of the overheard conversations, but neither

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[18] Halperin Affidavit, *supra* note 14, JA 102-103; Kissinger Deposition at 58-59.

[19] Memorandum from W. C. Sullivan to C. D. DeLoach (May 11, 1969), JA 51.

[20] *Id.*

[21] Memorandum from J. E. Hoover to Attorney General (May 12, 1969), JA 52.

[22] On May 6, 1969 Attorney General Mitchell had promulgated procedures to be followed in warrantless national security surveillance. Memorandum from the Attorney General to Director, FBI (May 6, 1969), JA 38-45. The procedures specified in that memo—including that a wiretap authorization request identify the target premises and estimate the period of surveillance—were not followed in the instant case. The Justice Department's policy of requiring renewals of wiretap authorizations every 90 days, *see* Mitchell Deposition at 9-10, was also ignored.

preserved the tapes of the conversations nor attempted to minimize overhearing of personal discussions.[23] Despite observations by the FBI in May and June of 1969 that the Halperin tap was not producing evidence of a leak,[24] Kissinger requested that the taps be continued.[25] On July 8, 1969 the FBI recommended ending some of the electronic surveillance of suspected leakers, including Halperin.[26] On September 15 Kissinger requested termination of all wiretaps except Halperin's and one other.[27] Four days later Halperin resigned from the NSC staff, although at Kissinger's request he continued as a consultant to the Council.[28]

Halperin retained his consultant position until May 1970, but had no access to classified information during that period, and worked only one day for the NSC.[29] The wiretap remained in place. Nor was there any reduction in surveillance when he resigned from his consultant posi-

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[23] Jones Deposition at 24-27.

[24] Memorandum from W. C. Sullivan to C. D. DeLoach (May 15, 1969), JA 54; Memorandum from W. C. Sullivan to C. D. DeLoach (June 20, 1969), JA 58.

[25] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55 ("Dr. Kissinger said he wanted the coverage to continue for a while longer"); Memorandum from A. Haig to H. A. Kissinger (June 4, 1969), JA 57 (series of "Talking Points" for meeting with Hoover: recommending continuing Halperin tap "so that a pattern of innocence can be firmly established").

[26] Letter from W. C. Sullivan to J. E. Hoover (July 8, 1969), JA 59 ("Halperin has said almost nothing on the telephone. My guess is that he assumes it is tapped.").

[27] Memorandum from W. C. Sullivan to C. D. DeLoach (Sept. 15, 1969), JA 60.

[28] Halperin Affidavit, *supra* note 14, JA 104.

[29] *Id.* *See* JA 161 (Kissinger's answers to interrogatories).

tion in protest over the American invasion of Cambodia in May 1970. After that resignation, however, the FBI reports on the wiretap were no longer sent to the National Security Adviser, but went to Haldeman, the President's chief administrative aide.[30] In July 1970 the FBI agent in charge of the wiretap suggested to his superior that the surveillance be lifted,[31] but it continued until February 10, 1971.[32]

Plaintiffs cite FBI logs showing that agents overheard more than 600 calls on the Halperin telephone, of which only 28 percent were between Halperin and people outside the family.[33] The summary letters from the FBI contain much political information, covering such topics

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[30] Memorandum from C. D. DeLoach to W. C. Sullivan (May 13, 1970), JA 75; Haldeman Deposition at 52-54.

[31] Note to W. C. Sullivan, JA 78 ("I haven't noticed much info of value in recent months from coverage—suggest consider discontinuing").

[32] The taps were removed at the instigation of the FBI, Memorandum from W. C. Sullivan to C. Tolson (Feb. 10, 1971), JA 81; Memorandum from J. E. Hoover to Attorney General (Feb. 11, 1971), JA 83, which had recently been criticized for its wiretapping practices. *Chronology*, in *Kissinger Hearings*, *supra* note 11, at 29 (citing Feb. 7, 1971 newspaper article criticizing FBI wiretapping). Director Hoover was scheduled to testify before Congress shortly thereafter. *See* S. Rep. No. 94-755, Book III, 94th Cong., 2d Sess. 326 (1976).

[33] Plaintiffs-appellants' brief at 11-12. The FBI logs, which are not complete, JA 115, show that 638 calls on the Halperin phone were recorded in whole or in part. Morton Halperin was party to 355 (55%) of the recorded calls on 253 separate dates, but 173 calls (27% of the total) were between him and his wife. Two hundred and seventy-seven (43%) of the calls were between Ina Halperin and persons not involved in this suit. Their three minor children were each overheard in at least one conversation in which they were identified, and 13 other log entries refer to unidentified children.

as planned publications criticizing the nation's Vietnam policy,[34] congressional lobbying on war-related legislation,[35] and political campaign plans, including potential opposition to President Nixon in 1972.[36] There is some evidence that the political information was valued at the White House. Disclosure in one of the Halperin summary letters that a former cabinet officer planned a magazine article opposing the Nixon Administration's foreign policy served as the basis for a planned "counter-attack" to the anticipated article.[37] The FBI summaries

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[34] Letter from J. E. Hoover to H. R. Haldeman (Oct. 14, 1970), addendum to plaintiffs-appellants' brief at 3 ("Halperin said he was writing a paper on the President's speech which he intended to give Max Frankel of the 'New York Times' to use as he desired. He also said that he was writing a newspaper article on Vietnam.").

[35] Letter from J. E. Hoover to H. R. Haldeman (May 26, 1970), *id.* at 2 (discussion of McGovern-Hatfield Amendment to cut off military funds); Letter from J. E. Hoover to H. R. Haldeman (June 23, 1970), *id.* at 3 (Halperin "agreed to talk to the 'top people' in the offices of Senators Norris Cotton and James B. Pearson on the war in Cambodia. [ ] described Senator Cotton as 'marginal' on the Church-Cooper amendment but said that Halperin's talk could make Senator Pearson favor the amendment.").

[36] Letter from J. E. Hoover to H. R. Haldeman (Nov. 13, 1970), *id.* at 4 ("Halperin and [ ] also discussed a meeting which may take place this week to advise Senator Muskie concerning 'China policy.'"); Letter from J. E. Hoover to H. R. Haldeman (Dec. 17, 1970), *id.* (discussed "forthcoming trip by Senator Edmund Muskie to Russia and said Muskie was making the trip recommended by Clifford * * *. He also mentioned that Averell Harriman was going with Muskie.").

[37] An FBI letter to Kissinger on December 29, 1969 said that Halperin had discussed a proposed article in *Life Magazine* by Clark Clifford, former Secretary of Defense, on Vietnam. JA 64. The letter identified foreign policy statements by Nixon that Clifford intended to attack (*e.g.*, that President Thieu of South Vietnam "is one of the five greatest men of our

revealed no evidence suggesting that Halperin was leaking classified data.[38]

The records of the Halperin wiretap were minimal. At first the FBI logs were kept at the Bureau in special files, where Kissinger and Haig reviewed them.[39] Subsequently summary letters were sent to Kissinger, Nixon (through presidential counsel John Ehrlichman), and occasionally Mitchell.[40] As noted above, after May 1970 only Haldeman received the letters. When the surveillance was terminated the records were stored in a White House safe. The wiretap program first came to public attention in the 1973 espionage trial of Dr. Daniel Ellsberg, when the Government admitted that Ellsberg had been overheard by the FBI on Halperin's home telephone.[41] This suit was filed in June 1973, within a month of that disclosure.

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time"; that "Vietnam is one of the finest hours in United States history"). The White House staff researched the alleged quotations, *see* Memorandum from Jim Keogh to Jeb Magruder (Jan. 12, 1970), JA 69, and Ehrlichman wrote to Haldeman, "This is the kind of early warning we need more of—your game planners are now in an excellent position to map anticipatory action." JA 70. The Clifford article never appeared.

[38] Part of the relief granted in the District Court was an order that Halperin's security file be amended to include "a statement by Dr. Kissinger that the wiretap produced no information impugning either Dr. Halperin's loyalty or his discretion." *Halperin v. Kissinger*, *supra* note 5, 434 F.Supp. at 1196.

[39] Letter from W. C. Sullivan to J. E. Hoover (May 20, 1969), JA 55.

[40] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 841.

[41] *United States v. Russo and Ellsberg*, No. 9373 (C.D. Cal., Order of May 11, 1973). The Ellsberg prosecution, which followed public disclosure of the Pentagon Papers, was dismissed when the Government refused to produce the Halperin wiretap records.

II. Individual Rights and National Security

This case presents the conflict between the Government's need to act decisively to safeguard the nation's security and those individual rights that are implicated in any surveillance situation.[42] In such a case we must carefully consider any impact that our decision might have on the nation's ability to defend itself and its vital interests. Equally, as the Supreme Court has said, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile."[43] Because of the significance of the competing interests at stake, we wish to consider their relationship before addressing the particular claims here.

Plaintiffs assert two intertwined constellations of personal rights: those revolving around privacy interests and those growing out of the First Amendment's guarantees of freedom of speech, press, association, and belief. The damage to privacy caused by Fourth Amendment violations was captured by Justice Brandeis' dissent in *Olmstead v. United States*:[44]

> [The Framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendent. * * *

The First Amendment buttresses the individual's protection against indiscriminate or unreasonable wiretapping.

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[42] *See United States v. United States District Court (Keith)*, 407 U.S. 297, 313 (1972).

[43] *United States v. Robel*, 389 U.S. 258, 264 (1967).

[44] 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Such surveillance invades the citizen's constitutionally protected right to free private discussion,[45] and must inevitably chill public speech. Either result is intolerable.

In recent years both the Supreme Court [46] and Congress [47] have recognized the substantial injury to personal rights caused by unreasonable electronic surveillance. Although the technology of investigation has developed dramatically in the last century, the dangers of unwarranted governmental intrusion into citizens' private lives have not changed since Justice Bradley wrote in *Boyd v. United States*:[48]

> It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. * * *

Without vigilant protection of a private space in which each citizen is free to pursue his own ideas and aspirations, we would betray our vision of a society based on the dignity of the individual.

The question presented by this case is when may these constitutional rights be overborne by the Executive to

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[45] *See Givhan v. Western Line Consolidated School District*, —— U.S. ——, ——, 47 U.S. L. WEEK 4102, 4104 (Jan. 9, 1979) (First Amendment rights not lost because communication is private rather than public).

[46] *See Berger v. New York*, 388 U.S. 41, 63 (1967) ("Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."); *Katz v. United States*, 389 U.S. 347 (1967); *Keith*, *supra* note 42.

[47] *See* 18 U.S.C. §§ 2511-2520 (1976) (Title III); Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 STAT. 1783.

[48] 116 U.S. 616, 630 (1886).

protect the security of the entire nation. Unfortunately, the inherent vagueness of the term "national security" hampers careful analysis.[49] All would agree that the term includes situations where the very existence of the Government is in jeopardy, but consensus may break down beyond such clear instances.

The Supreme Court has taken an extremely narrow view of the circumstances in which the Executive may exercise extraordinary powers under the Constitution. In *Mitchell v. Harmony*[50] the Court restricted the military's power to convert to its own use private property in a theatre of war.

> [T]he danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for * * * * * *[51]

This attitude was echoed in decisions striking down martial law in Indiana in 1864[52] and in Hawaii in 1943.[53] In both cases the Supreme Court ruled that normal judicial processes may be superseded only when "foreign invasion" or "civil war" physically close the courthouses.[54] Similarly, in *Youngstown Sheet & Tube*

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[49] *See Keith, supra* note 42, 407 U.S. at 314 ("The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' "); *id.* at 320 ("inherent vagueness of the domestic security concept"); *Zweibon v. Mitchell (Zweibon I)*, 516 F.2d 594, 653-654 (D.C. Cir. 1975) (*en banc*), *cert. denied*, 425 U.S. 944 (1976).

[50] 54 U.S. (13 How.) 115 (1851).

[51] *Id.* at 134.

[52] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

[53] *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

[54] *Id.* at 326 (Murphy, J., concurring); *Ex parte Milligan*, *supra* note 52, 71 U.S. (4 Wall.) at 127.

Co. v. Sawyer[55] the Court found no basis in the Constitution for the President's seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.[56] Justice Jackson observed on that occasion that, because the drafters of the Constitution "suspected that emergency powers would tend to kindle emergencies," they "made no express provision for exercise of extraordinary authority because of a crisis."[57]

The Supreme Court's steadfast refusal to expand its view of emergency powers reflects an appreciation of the consequences of any national security exception to the usual constitutional limits on Executive conduct. The Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security interests may be affected by fluctuations in international trade and the supply of natural resources, by social unrest at home and abroad, and by public disclosure of policy deliberations. But such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights.

We believe, therefore, that whatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation. Absent such exigent circumstances, there can be no appeal to powers beyond those enumerated in the

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[55] 343 U.S. 579 (1952).

[56] *Id.* at 587 (Black, J.) ("It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution.").

[57] *Id.* at 650 (Jackson, J., concurring). *See also New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring); *Zweibon I*, *supra* note 49, 516 F.2d at 635 n.107.

Constitution or provided by law.[58] Any security from one danger purchased with our individual rights would be but an illusion, for its price would be those protections against all other threats to our liberty.

III. TITLE III AND THE FOURTH AMENDMENT

Standards for evaluating the legality of this electronic surveillance derive from the Constitution and from Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[59] The Government has conceded that the Fourth

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[58] *See Zweibon I*, *supra* note 49, 516 F.2d at 649-650; 18 U.S.C. § 2518(7) (1976). *See also Ex parte Milligan*, *supra* note 52, 71 U.S. (4 Wall.) at 120-121.

[59] We are not concerned over the justiciability of this case. Although the Constitution exclusively commits the resolution of some questions to the Executive or Legislative Branches, here we are called on to determine whether electronic surveillance was consonant with statutory and constitutional strictures, a traditional judicial function that is governed by well established and manageable standards. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 73 (1978). Decision of these appeals requires no initial policy decisions on how best to deal with the problem of Government leaks; nor need it entail any embarrassment to the Executive. Our course is reinforced by the Supreme Court's decision in *Keith*, *supra* note 42, which involved "the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval." 407 U.S. at 299. There the Court proceeded immediately to resolution of the merits, rejected the contention that national security wiretaps involve factors "beyond the competence of courts to evaluate," *id.* at 319; *see Zweibon I*, *supra* note 49, at 641-647, and declined to carve out a national security exception to the warrant requirement of the Fourth Amendment.

Our duty to decide this case is not diminished because we deal with the President's foreign affairs power. The Supreme Court explicitly stated in *Baker v. Carr*, 369 U.S. 186, 211 (1962), that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial

Amendment's ban on *unreasonable* searches and seizures applied to national security wiretaps in 1969,[60] but disputes the application of the Amendment's judicial warrant requirement.[61] The *Keith* Court observed that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause," [62] but warrantless searches have been approved in "certain carefully defined classes of cases." [63] Thus we must acknowledge that the Fourth Amendment's warrant require-

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cognizance." *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution"). Of course, the Executive's determination that national security was threatened in a particular situation is entitled to deference, *see United States v. Nixon*, 418 U.S. 683, 711-712 (1974), but "[E]xecutive action is not proof of its own necessity." *Duncan v. Kahanamoku*, *supra* note 53, 327 U.S. at 336 (Stone, C.J., concurring).

[60] Indeed, that was the Government's argument to this court in *Zweibon I*, *supra* note 49, 516 F.2d at 628.

[61] *Keith*, *supra* note 42, 407 U.S. at 314-321; *Zweibon I*, *supra* note 49, 516 F.2d at 613-614. *Keith* involved a "domestic security" threat posed by an American citizen suspected of planning disruptive actions, such as bombing, while *Zweibon I* concerned a "foreign security" danger resulting from anti-Soviet activities by the Jewish Defense League that might provoke Russian retaliation. *Keith* was a unanimous ruling, and six of the eight judges participating in *Zweibon I* agreed that the Fourth Amendment warrant requirement applied to that surveillance. The other two judges in *Zweibon I* would not have reached the Fourth Amendment issue in that case.

[62] *Keith*, *supra* note 42, 407 U.S. at 315.

[63] *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). *See, e.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (search of federally regulated liquor dealer); *Chimel v. California*, 395 U.S. 752, 763 (1969) (arresting officers may search area "within [the] immediate control" of suspect); *Terry v. Ohio*, 392 U.S. 1, 20 (1968) (incipient crime).

ment may not always apply, while a reasonableness standard may vary in different situations.[64] In contrast, Title III bans most electronic surveillance and specifies procedures for wiretapping and eavesdropping in particular situations; but the statute expressly does not limit the President's constitutional power to wiretap in national security situations.[65] Although the mandate of the statute is more precise, the reach of the constitutional provision may be seen as greater.[66]

To gauge the propriety of the Halperin surveillance under the overlapping constitutional and statutory stand-

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[64] *See Scott v. United States*, 436 U.S. 128, 139 (1978) ("Because of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case."); *Keith*, *supra* note 42, 407 U.S. at 314 ("the Fourth Amendment is not absolute in its terms").

[65] The plurality opinion in *Zweibon I*, *supra* note 49, 516 F.2d at 659-670, concluded that although Title III did not affect presidential wiretapping *powers* in national security situations, some of the procedural and remedial provisions of the statute were relevant to unconstitutional surveillances in such instances. But our decision today in *Zweibon v. Mitchell* (*Zweibon III*), —— F.2d ——, —— (D.C. Cir. No. 78-1348, decided July 12, 1979) (slip op. text at notes 52-60), restricts that particular conclusion to prospective effect. Since this case involves events from 1969 until 1971, only the constitutional procedures and remedies are relevant here.

[66] Last year Congress enacted additional legislation explicitly covering national security surveillance involving foreign policy problems, Foreign Intelligence Surveillance Act of 1978, *supra* note 47, and repealing § 2511(3) of Title III, the pivotal statutory provision in this case. The 1978 statute does not control this case, however. That law expressly does not apply to surveillances that are terminated no more than 90 days after the Chief Justice designates the first judge to sit on a special court to review warrant applications under the new law. Foreign Intelligence Surveillance Act of 1978, 92 STAT. 1798, § 301.

ards, we must review the circumstances of the wiretapping and its connection to reasonable national security concerns.[67] If that connection is remote, or the supposed national security concerns ephemeral, we must remand to the District Court for a determination whether Title III should be applied: where the professed national security issues appear valid, we must still insist on compliance with the Fourth Amendment. We will first consider the applicability of Title III and then examine the requirements of the Fourth Amendment.

A

Title III was designed to limit Government use of electronic surveillance techniques. According to the Supreme Court, the statute and legislative history "evince[] the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." [68] This court has observed

[67] That this relationship may be somewhat distant was conceded by defendant Kissinger in testimony before the Senate Foreign Relations Committee:

> [W]hen one is new in Government, leaks take on an extraordinary significance, because one has a sort of a tendency to think that a top secret paper is inviolate * * *.
> * * *
> One has to be candid. This is sometimes out of proportion to the intrinsic damage that this particular leak may do, looked at in the long view. * * *

Kissinger Hearings, *supra* note 11, at 323.

[68] *United States v. Giordano*, 416 U.S. 505, 515 (1974). *See Alderman v. United States*, 394 U.S. 165, 175 (1969) ("The general rule under [Title III] is that official eavesdropping and wiretapping are permitted only with probable cause and a warrant."); *United States v. Jones*, 542 F.2d 661, 671 (6th Cir. 1976) ("the pervasive theme of Title III [is] that electronic surveillance should be sharply curtailed and in no

that "[t]he Act's essential purpose * * * was to combine a limited and carefully articulated grant of power to intercept communications with an elaborate set of safeguards to deter abuse and to expunge its effects in the event that it should occur." [69]

The statute is straightforward. Section 2511 bans all electronic surveillance not authorized by Title III, with three exceptions not relevant to this case.[70] Surveillance is permitted for investigation of "classes of crimes carefully specified in 18 U.S.C. § 2516," [71] so long as stringent procedural requirements are satisfied.[72] The statute pro-

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instance be undertaken without strict judicial authorization and supervision"); S. Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968).

[69] *In re Evans*, 452 F.2d 1239, 1243 (D.C. Cir. 1971), *cert. denied*, 408 U.S. 930 (1972).

[70] Those exceptions involve wiretapping by communications common carriers for billing and maintenance purposes, 18 U.S.C. § 2511(2)(a)(i) (1976), by the Federal Communications Commission in its regulatory capacity, *id.* § 2511(2)(b), and by prior consent of a party, *id.* § 2511(2)(c).

[71] *Keith*, *supra* note 42, 407 U.S. at 301-302. Among the crimes for which surveillance under Title III may be authorized are espionage, sabotage, treason, labor racketeering, murder, kidnapping, robbery, extortion, bribery of public officials, obstruction of justice, gambling, and drug trafficking. 18 U.S.C. § 2516 (1976).

[72] The warrant application must include "a full and complete statement of the facts and circumstances" showing the need for the wiretap or eavesdropping, 18 U.S.C. § 2518(1)(b) (1976), an explanation of why other investigative procedures either have not been successful or are not appropriate, *id.* § 2518(1)(c) and an estimate of the period of surveillance, *id.* § 2518(1)(d). Government agents must minimize the intrusiveness of the surveillance and no warrant can extend for longer than 30 days. *Id.* § 2518(5). Finally, after the wiretapping or eavesdropping is terminated, all identifiable persons whose communications have been intercepted

vides for civil as well as criminal prosecution of violators, with minimum civil damages set at $100 for each day of violation, plus punitive damages and attorney's fees.[73] A good faith defense is available to Government officials sued under Title III, as we discuss in detail in Part IV of this opinion.

The applicability of Title III to the Halperin wiretap hinges on Section 2511(3), which enumerates five national security situations in which surveillance would not be covered by the statute. This provision, as the *Keith* Court held, is an "expression of congressional neutrality" on national security surveillances:

> [N]othing in § 2511(3) was intended to *expand* or to *contract* or to *define* whatever presidential surveillance powers existed in matters affecting the national security. * * *[74]

Hence, if a surveillance falls under Section 2511(3), it is still subject to constitutional limitations, but not to Title III's requirements and prohibitions.

Only one of the five circumstances listed in Section 2511(3) might apply to this case: That nothing in Title III "shall limit the constitutional power of the President * * * to protect national security information against foreign intelligence activities."[75] We face an

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must be notified of the surveillance unless the investigators show good cause not to do so. *Id.* § 2518(8)(d).

[73] *Id.* § 2520.

[74] *Keith*, *supra* note 42, 407 U.S. at 308 (emphasis in original).

[75] The other four circumstances are protection against "actual or potential attack or other hostile acts of a foreign power," obtaining "foreign intelligence information deemed essential to the security of the United States," and protection against either "overthrow of the Government by force or other unlawful means," or any other clear and present danger

initial problem in applying this provision to the instant case, since there was never any allegation that the Halperins were directly connected to "foreign intelligence activities." Although it is surely possible for vital secrets to be revealed through a leak to the press, both courts and Congress have looked for a direct link between the wiretap target and a foreign interest as a justification for surveillance.[16] In the absence of such a connection,

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to the structure or existence of the Government." 18 U.S.C. § 2511(3) (1976).

[16] *See, e.g., Keith, supra* note 42, 407 U.S. at 309 ("There is no evidence of any involvement, directly or indirectly, of a foreign power."); *Zweibon I, supra* note 49, 516 F.2d at 655 (no Executive power for warrantless wiretapping "at least where the subject of the surveillance is a domestic organization that is not the agent of or acting in collaboration with a foreign power"); S. Rep. No. 1097, *supra* note 68, at 94 (discussing § 2511(3) in context of foreign security threats: cites members of Communist Party of the United States as "instruments of the foreign policy of a foreign power" and notes problem of "agents of foreign powers and those who cooperate with them"). The Foreign Intelligence Surveillance Act of 1978, *supra* note 47, specifies procedures for wiretapping and eavesdropping of "agents of a foreign power" and participants in terrorist acts. *Id.* § 101(b) & (c). The following striking passage appears in the House report on that legislation:

> It should be clear from the foregoing, but for the sake of explicitness the committee wishes to make perfectly clear, that *surveillance would not be authorized under this*, or any other definition of agent of a foreign power *against an American reporter merely because he gathers information for publication in a newspaper, even if the information was classified by the Government. Nor would it be authorized against a Government employee or former employee who reveals secrets to a reporter or in a book for the purpose of informing the American people.* * * *

H.R. Rep. No. 95-1283, Part I, 95th Cong., 2d Sess. 40 (1978) (emphasis added).

we must closely scrutinize the validity of the national security rationale.[77]

The District Court declined to apply Title III because of "the indisputable difficulties and ambiguities presented by § 2511(3)."

> In view of the confused state of the law and the 30-year history of similar [warrantless national security wiretaps] * * *, the Court finds that defendants' determination that Title III was inapplicable to the Halperin wiretap was reasonable during the period of surveillance. * * *[78]

This statement conflates the standards for a good faith defense with the applicability of Title III,[79] and reflects a fundamental misapprehension of the Halperins' position. They argue that the wiretap was not related to national security, and thus was subject to the substantive and procedural terms of Title III. If they are correct in their first contention, the second is incontestable. The "30-year history" of warrantless national security wiretaps could not affect the applicablity of Title III to non-national security surveillances. Consequently, the proper inquiry for the District Court was whether the surveillance challenged here was a valid national security action.[80] To the extent that it was not, any uncertainty

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[77] In view of the well-documented practice of classifying as confidential much relatively innocuous or noncritical information, *see* H.R. Rep. No. 93-221, 93d Cong., 1st Sess. 100 (1973), we cannot conclude automatically that revelation of all "top secret" documents will endanger national security. *See* note 67 *supra*; *see also New York Times Co. v. United States*, *supra note* 57, 403 U.S. at 719 (Black, J.).

[78] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 842.

[79] For discussion of good faith defense and absolute immunity issues, *see* Part IV *infra*.

[80] *See Burkhart v. Saxbe*, 397 F.Supp. 499, 504 (E.D. Pa. 1975).

about the meaning of Section 2511(3) at the time of the wiretapping would be relevant only to the question of the defendants' official immunity to suit. As a result, we must reverse the grant of summary judgment on the statutory claim and remand for a determination by the District Court of whether the surveillance was reasonably intended to guard national security data from foreign intelligence agencies.

In this framework we see little evidence before us for classifying the surveillance from May 1970 to February 1971 as a national security action not reached by Title III. During those nine months Halperin had no official connection with the Government, and, in fact, had lacked access to much classified information for the preceding year;[81] a continuous, year-long wiretap had revealed no evidence that he was a leaker; and the reports on the wiretap were not sent to Kissinger, the President's National Security Adviser, but to Haldeman, a political and administrative adviser. Moreover, since Halperin had almost no official contact with the National Security Council from September 1969 to May 1970, the national security basis for surveillance during those nine months would seem almost equally attenuated. Finally, plaintiffs have raised questions about the purported national security nexus even at the beginning of the wiretap. Halperin claims that the surveillance was initiated for political reasons stemming from his connection to previous

[81] The Government argues that since much of the information Halperin had access to in his previous jobs remained classified after he left the Government, he was still a potential leaker. Passing by the problem of overclassification of documents, *see* note 77 *supra*, we think this argument proves too much. It would justify surveillance of thousands of former federal employees without any further indication of security threat.

administrations.[82] He points to letters from Senator Goldwater to President Nixon and to Attorney General Mitchell recommending his ouster,[83] as well as to Kissinger's apparent request on June 4, 1969 that the surveillance be continued to establish "a pattern of innocence." [84] These events suggest, Halperin argues, that he was initially targeted for surveillance in order to bolster within the Nixon Administration the political credibility of Kissinger's staff appointments.

On remand the District Court must address all of these contentions. Title III will apply to any period during which the wiretap did not involve the primary purpose of protecting national security information against foreign intelligence activities. Where the parties have posed genuine issues of material fact, the court will have to undertake an evidentiary inquiry. Summary proceedings should be limited to those instances where the record before the court indicates no such issue.[85]

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[82] *See* note 15 *supra*. The second impeachment article approved by the House Judiciary Committee charged President Nixon with abusing the rights of private citizens by authorizing "Electronic Surveillance or Other Investigations for Purposes Unrelated to National Security, the Enforcement of Laws, or Any Other Lawful Function of His Office." H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146 (1974). The Committee added in explanation that Nixon "falsely used a national security pretext to attempt to justify" improper surveillances. *Id.* The Committee also squarely concluded that the May 1969 wiretaps, including Halperin's, were established for "political purposes." *Id.* at 35.

[83] JA 35-37.

[84] Memorandum from A. Haig to H. Kissinger (June 4, 1969), JA 57.

[85] Rule 56 of the Federal Rules of Civil Procedure directs that a motion for summary judgment must be granted if the materials submitted to the court "show that there is no genuine issue as to any material fact and that the moving

B

Throughout the 21 months of the Halperin wiretap the defendants in this case were under an obligation to comply with both the reasonableness and the warrant requirements of the Fourth Amendment. The District Court found that at some point during the surveillance the wiretap

> developed into a dragnet which lacked temporal and spatial limitation. It represent[ed] the antithesis of the "particular, precise, and discriminate" procedures required by the Supreme Court in numerous Fourth Amendment cases. * * *[86]

Although we agree that the surveillance did not satisfy the reasonableness standard, we must remand for consideration both of the warrant question and of *when* the wiretap became unreasonable. In addition, we cannot affirm the award of $1 nominal damages for the constitutional violations established here.

1. When the Supreme Court first applied the warrant provision of the Fourth Amendment to wiretapping in 1967, it expressly reserved the question of prior ju-

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party is entitled to a judgment as a matter of law." *See Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977); *Askew v. Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976). *See also* text at notes 113-118 *infra*.

In view of the extensive discovery that has taken place in this case, the District Court may well be able to resolve remanded questions without reopening the record. It remains in the court's discretion, naturally, to receive additional submissions as necessary.

[86] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 843 (*citing Osborn v. United States*, 385 U.S. 323, 329-330 (1966); *Berger v. New York*, *supra* note 46, 388 U.S. at 55-60; *Katz v. United States*, *supra* note 46, 389 U.S. at 354-357)).

dicial approval of national security surveillances.[87] In *Keith*, however, the Court found that a warrant was necessary before a domestic target deemed a threat to national security could be wiretapped, and in *Zweibon I* this court ruled that a warrant was needed to wiretap a domestic group that may be concerned with foreign affairs but "that is not the agent of or acting in collaboration with a foreign power * * *."[88] At the root of these decisions was the conviction that prior judicial approval of wiretapping for national security matters, absent exigent circumstances, falls within the competence of the judiciary,[89] poses no additional threat to national security,[90] and provides a valuable check on Executive discretion.[91]

For the reasons articulated in our opinion today in *Zweibon v. Mitchell* (*Zweibon III*),[92] we conclude that a warrant was required for the Halperin wiretap in May 1969. The reasoning of both *Keith* and *Zweibon I*, which dealt with wiretaps initiated during the same period, applies with equal force to this situation, and there is no basis for limiting those cases to prospective effect. The District Court in the instant case "[a]ssum[ed]

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[87] *Katz v. United States*, *supra* note 46, 389 U.S. at 358 n.23 ("Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.").

[88] *Zweibon I*, *supra* note 49, 516 F.2d at 655.

[89] *Keith*, *supra* note 42, 407 U.S. at 320; *Zweibon I*, *supra* note 49, 516 F.2d at 641-647.

[90] *Keith*, *supra* note 42, 407 U.S. at 320-321; *Zweibon I*, *supra* note 49, 516 F.2d at 647-648.

[91] *Keith*, *supra* note 42, 407 U.S. at 316-317; *Zweibon I*, *supra* note 49, 516 F.2d at 633-636.

[92] —— F.2d —— (D.C. Cir. No. 78-1348, decided July 12, 1979).

arguendo" that defendants were not subject to the warrant requirement, although it is not clear from that opinion whether the assumption was based on retroactivity considerations or defendants' possible immunity from suit.[93] In any event, such an assumption for purposes of argument is no substitute for a specific holding by the District Court. Of course, the defendants may be able to make out an immunity defense by arguing that due to uncertainty in the law on the warrant requirement there were reasonable grounds in 1969 for their failure to acquire a warrant, and that they did not act in bad faith.[94] This is a distinct question, however, from whether the Fourth Amendment mandated a warrant.

2. As we discussed above, we believe that Title III most likely should apply to at least part of the period of the Halperin surveillance. Nevertheless, for any period during which the District Court concludes that the surveillance was genuinely based on national security concerns, the wiretap might still have violated the Fourth Amendment's reasonableness standard.[95] The duration or conduct of the surveillance might well be deemed to have been unreasonable in view of the likely product of the wiretap, especially after the initial period. In that event, the trial court would have to establish the time span of that constitutional violation in order to determine damages.[96]

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[93] *See Halperin v. Kissinger, supra* note 4, 424 F.Supp. at 842-843.

[94] *See* Part IV *infra*.

[95] The constitutional remedy would be relevant only if the more specific procedures and remedies of Title III were not applicable. Of course, the constitutional and statutory remedies could not be granted simultaneously.

[96] Although the plurality in *Zweibon I, supra* note 49, found that some of the procedures and the civil damages provision

3. Damage suits for the vindication of individual rights date from the eighteenth century in England,[97] and have been widely recognized in our courts.[98] The Supreme Court stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[99] The instant suit is squarely within this tradition, and the Halperins are "entitled to recover money damages for any injuries [they have] suffered as a result of the * * * violation of the [Fourth] Amendment."[100]

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of Ttitle III should apply to unconstitutional wiretaps in national security situations, our ruling in *Zweibon III*, *supra* note 65, restricts that position to prospective effect. As a result, the District Court in this case will have to consider compensatory damages for any unconstitutional surveillance. *See also* note 106 *infra*.

[97] *See Entick v. Carrington*, 95 Eng. Rep. 807, 19 How. St. Tr. 1030 (1765) (unlawful search by King's officers); *Wilkes v. Wood*, 98 Eng. Rep. 489, 19 How. St. Tr. 1075 (1763) (same).

[98] *See, e.g., Nixon v. Condon*, 286 U.S. 73 (1932) (recognizing damage remedy in civil suit alleging wrongful denial of right to vote); *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919) (same).

[99] 403 U.S. 388, 395 (1971). In Justice Harlan's pithy phrase, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410 (Harlan, J., concurring).

[100] *Id.* at 397. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court ruled that in the absence of proof of injury plaintiffs alleging violation of procedural due process rights may win only nominal damages. We think that holding does not require a similar award to the Halperins for two reasons. First, the Court emphasized that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264-265. The due process issue

Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate. In *Paton v. LaPrade* the Third Circuit enumerated many of the intangible injuries that might have been suffered by a student unreasonably investigated by the FBI: "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." [101] This approach has been followed by other circuits in suits alleging constitutional violations by state officials under 28 U.S.C. § 1983 (1976).[102]

Due to the plaintiffs' reliance on a "presumption" of injury in requesting a damage award, the District Court concluded that there was "no demonstrable injury." [103]

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in *Piphus* concerned a student's right to a pre-suspension hearing, so it would indeed have been difficult to estimate the plaintiff's injury unless he could have shown that he would not have been suspended if a hearing had been held. The substantive rights asserted by the Halperins are of a much different character, as is evident from the traditional damage remedy for unlawful search marked by the English cases of *Entick* and *Wilkes*, *supra* note 97, and our *Bivens* doctrine. *See Carey v. Piphus*, *supra*, 435 U.S. at 264-265 (distinguishing cases involving "denial of Fourth Amendment rights"). Second, the Supreme Court ruled that the plaintiff in *Piphus* might still prove actual injury but simply could not claim a presumption of injury. *Id.* at 262-264. To the extent that the plaintiffs here can establish actual though intangible injury, damages would clearly be appropriate even under *Piphus*.

[101] 524 F.2d 862, 871 (3d Cir. 1975). Because it involved First Amendment and privacy rights, *id.* at 869-870, *Paton* is not limited by the Supreme Court's *Piphus* ruling. *See* note 100 *supra*.

[102] *See, e.g., Seaton v. Sky Realty Co.*, 491 F.2d 634, 636-638 (7th Cir. 1974); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970).

[103] *Halperin v. Kissinger*, *supra* note 5, 434 F.Supp. at 1195. Plaintiffs attribute their course to a pre-*Piphus* belief that

We think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be "inferred from the circumstances," [104] and if established would surely entitle the Halperins to more than nominal recovery. This court has held that in cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." [105] Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts." [106]

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injury should be presumed, based on the lower court rulings in *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976), and *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). *See* note 100 *supra*. We see no reason why, on remand, they should not be permitted to amend their pleadings and attempt to demonstrate injury.

[104] *Seaton v. Sky Realty Co.*, *supra* note 102, 491 F.2d at 637-638.

[105] *Tatum v. Morton*, 562 F.2d 1279, 1282 (D.C. Cir. 1977) (First Amendment claim).

[106] *Id.* at 1287 (Wilkey, J., concurring). Although not directly controlling for Fourth Amendment violations, *see* note 65 *supra*, it is certainly illuminating that Congress in Title III identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976). One would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions.

IV. The Immunity Defense

All individual defendants claim an absolute immunity from civil damage suits for actions undertaken in their official capacities. The District Court rejected these claims, and we agree with that ruling. Defendants, including former President Nixon, are entitled to a qualified immunity on both the Fourth Amendment and the Title III claims if they can show that they had reasonable grounds for believing their actions were legal (the "objective" basis) and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping (the "subjective" basis).[107] Because former President Nixon advances particular arguments in support of his own absolute immunity, we will consider his status separately.

A

Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions. This doctrine assumes that the initiation of a prosecution and the resolution of a dispute are especially likely to incite individualized wrath,[108] and that the review processes of the judicial system provide an automatic safeguard against improper actions.[109] Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution.[110]

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[107] *See Zweibon I, supra* note 49, 516 F.2d at 670-673.

[108] *Butz v. Economou*, 438 U.S. 478, 509-510, 512 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 424-426 (1976).

[109] *Butz v. Economou, supra* note 108, 438 U.S. at 512; *Imbler v. Pachtman, supra* note 107, 424 U.S. at 427; *see also Pierson v. Ray*, 386 U.S. 547, 554 (1967). *See generally Stump v. Sparkman*, 435 U.S. 349 (1978).

[110] Although defendant Mitchell might be entitled to prosecutorial immunity for some of his actions as Attorney General, this is not such a case since there is no allegation that the

In *Butz v. Economou*, 438 U.S. 478 (1978), the Supreme Court outlined two bases for qualifying the immunity from suit enjoyed by Executive officials: (1) without such qualification the damage actions contemplated by *Bivens* would be "drained of meaning" and many constitutional violations would go unremedied;[111] and (2) since state officials may be held liable for such violations,[112] it would "stand the constitutional design on its head" if the courts established "a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials * * *."[113]

The *Economou* Court adopted for federal officials the objective and subjective standards for qualified immunity of *Wood v. Strickland*:[114]

> [An official is] not immune * * * [A] if he knew or reasonably should have known that the action he took * * * would violate the constitutional rights of the [person] affected, or [B] if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *. * * *

We stress that only one of these two standards need be satisfied in order for a defendant to lose his immunity from suit.[115]

Halperin surveillance was part of a criminal prosecution. *See Forsyth v. Kleindienst*, —— F.2d ——, —— (3d Cir. No. 78-1611, decided May 22, 1979) (slip op. at 21-22); *Apton v. Wilson*, 506 F.2d 83, 93 (D.C. Cir. 1974); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978).

[111] 438 U.S. at 501.

[112] *See* 28 U.S.C. § 1983 (1976).

[113] *Butz v. Economou*, *supra* note 108, 438 U.S. at 504.

[114] 420 U.S. 308, 322 (1975). *See Procunier v. Navarette*, 434 U.S. 555, 562, 565-566 (1978); *Pierson v. Ray*, *supra* note 109, 386 U.S. at 557.

[115] We follow the holding in *Zweibon I*, *supra* note 49, 516 F.2d at 670-671, that the good faith defense specified in § 2520 of Title III, 18 U.S.C. § 2520 (1976), is the same as in

To reduce the potential for harassment of Executive officials, the Supreme Court has recommended resolution of the immunity issue, when possible, on summary judgment.[116] This course is best suited for handling the objective basis for qualified immunity. Courts should be able to determine at the pretrial stage whether there is a genuine issue of material fact as to the reasonableness of a defendant's belief that he was acting legally. On the subjective criterion—which "turns on officials' knowledge and good faith belief" [117]—summary action may be more difficult. Questions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved.[118] Nevertheless, in view of the Supreme Court's emphasis on the importance of summary procedures in suits like this one, District Courts must carefully examine any pretrial claim by a defendant that a plaintiff has not raised a genuine issue of material fact as to defendant's subjective good faith.[119] Should the

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constitutional cases. Because Judge Robb concurred in the plurality's position on this point, 516 F.2d at 688, that holding was reached by a majority of this court.

[116] *Butz v. Economou, supra* note 108, 438 U.S. at 508.

[117] *Apton v. Wilson, supra* note 110, 506 F.2d at 95.

[118] *See Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962) (summary judgment "should be used sparingly * * * where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). For application of this principle to cases involving constitutional claims, *see* cases cited in note 85 *supra*. *See also Paton v. LaPrade, supra* note 101, 524 F.2d at 872; *Abramson v. Mitchell*, 459 F.2d 955 (8th Cir. 1972).

[119] A formulation of the summary judgment standard in a similar context was offered by the Seventh Circuit in *Askew v. Bloemker, supra* note 85, 548 F.2d 679, involving a suit against state officials for violation of Fourth Amendment rights:

[continued]

court conclude on the record before it that the defendant is not entitled to a judgment as a matter of law,[120] the court must move beyond summary procedures.[121] At trial

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> Plaintiffs are entitled to take to the jury the state-of-mind defense on which the defendants herein rely as long as plaintiffs have adduced specific facts from which a reasonable man, viewing all the evidence in the light most favorable to plaintiffs and resolving all testimonial conflicts in the same manner, could infer that the defendants were acting * * * in bad faith * * *.

Of course, at the pleading stage plaintiffs must allege that the defendants acted with "malicious intention" in order to proceed with a claim that immunity should be denied on the subjective criterion. *Procunier v. Navarette*, *supra* note 114, 434 U.S. at 561.

[120] Since pretrial discovery has concluded in this case, *see* note 85 *supra*, we do not attempt to sketch comprehensive standards guiding the discretion of District Judges faced with requests to permit detailed discovery of the mental processes and confidential discussions of Executive decision-makers. We advert to the problem only because we believe close control of discovery in suits against such officials is essential to the preservation of meaningful official immunity. *See United States v. Nixon*, *supra* note 59, 418 U.S. at 703-713 (recognizing a presumptive privilege for confidential conversations between a President and his close advisors, but finding that general interest to be overborne by a specific showing of need for such evidence in a pending criminal trial); *United States v. Reynolds*, 345 U.S. 1, 6-12 (1953) (military secrets); *cf. United States v. Morgan*, 313 U.S. 409, 422 (1941) (mental processes of administrative decision-makers). Where a showing of need has prevailed over a broad claim of privilege, a District Court might be well advised to require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high-level officials.

[121] *Apton v. Wilson*, *supra* note 110, 506 F.2d at 94-95. Judge Gesell in his concurrence has highlighted the central problem posed by the post-*Ecqnomou* immunity doctrine: How to make effective the use of summary procedures in preventing harrassment of Executive officials. We believe that the approach

defendants would have to establish their subjective good faith as an affirmative defense.[122]

As to defendants Mitchell and Haldeman, the District Court found "their activities relating to the wiretap *continuance* unreasonable." [123] On the subjective claim, the court noted:

> The evidence here reflects a twenty-one month wiretap continuance without fruits or evidence of wrongdoing, a failure to renew or evaluate the material obtained, a lack of records and procedural compliance, a seemingly political motive for the later surveillance and dissemination of reports, and an apparent effort to conceal the wiretap documents.[124]

The District Court also applied the objective standard, finding that the defendants violated the Fourth Amendment, and, "[l]ike any other citizen, these officials are charged with knowledge of established law and must be held accountable for personal misconduct." [125]

We find no basis for disturbing these rulings. Certainly there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution, and the record contains ample support for the trial court's ruling on bad faith. Under the terms of our remand, however, the District Court will also have to consider any claim by defendants that they are immune

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we take here conforms with the requirements of Rule 56 of the Federal Rules of Civil Procedure, and with the concerns of the *Economou* Court for the interests of both potential plaintiffs and potential defendants.

[122] *See Zweibon I*, *supra* note 49, 516 F.2d at 607 n.18.

[123] *Halperin v. Kissinger*, *supra* note 4, 424 F.Supp. at 845 (emphasis added).

[124] *Id.*

[125] *Id.*

from liability for their failure to acquire a warrant for the wiretap, a question which the District Court has not directly addressed.[126] In a complex case like this one, the District Court must undertake a particularized inquiry into the immunity available for each alleged type or period of constitutional or statutory violation in order to safeguard both the individual rights asserted by the Halperins and the freedom of Executive officials to act.

B

In order to accept defendant Nixon's argument that he, as a former President, is absolutely immune from this suit, we would have to hold that his status as President sets him apart from the other high Executive officials named as defendants to this action. Such a distinction would have to rest on a determination either that the Constitution impliedly exempts the President from all liability in cases like this or that the repercussions of finding liability would be drastically adverse. Because we are unable to make that distinction, we do not believe he is entitled to absolute immunity to a damage action by a citizen subjected to an unconstitutional or illegal wiretap.

1. The constitutional scheme betrays no indication that any kind of immunity was intended for the President or the Executive Branch. While congressmen enjoy the privileges of the Speech and Debate Clause of Article I,[127]

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[126] On the District Court's treatment of the Fourth Amendment warrant requirement, *see* p. 28 *supra*. In addition, the warrant provision of Title III might also be relevant to this case if the District Court determines on remand that there was no national security basis for the initiation of the wiretap. *See* p. 25 *supra*.

[127] U.S. CONST., Art. I, § 6, cl. 1.

> [t]he Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. This silence cannot be ascribed to oversight. * * *[128]

In addition, there are indications that the Constitutional Convention was presented with the question of Executive privileges and chose not to grant any.[129] The Convention did specify, however, that an impeached President may still be tried in the courts for any offense.[130]

> By contemplating the possibility of post-impeachment trials for violations of law committed in office, the Impeachment Clause itself reveals that incumbency

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[128] *Nixon v. Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (*en banc*).

[129] At one point in the Convention's deliberations, James Madison suggested "the necessity of considering what privileges ought to be allowed to the Executive," 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 503 (1911), but the proposal was not taken up. Charles Pinckney, who was intimately involved in consideration of the privileges question, *see id.* at 502; 3 *id.* at 605-606, explained to the United States Senate in 1800 why Madison's suggestion went unheeded:

> . . . Let us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. . . . No privilege of this kind was intended for your Executive, nor any except that which I have mentioned [speech and debate] for Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privilege to what was necessary, and no more.

3 *id.* at 385.

[130] U.S. CONST., Art. 1, § 3, cl. 7.

does not relieve the President of the routine legal obligations that confine all citizens. * * *[131]

2. The doctrine of separation of powers wisely counsels the judiciary to act with care when reviewing actions by other branches, but the courts may not evade their constitutional responsibility to delineate the obligations and powers of each branch. Thus, although courts lack power to grant injunctive relief against prospective presidential actions that may be discretionary,[132] Presidents are scarcely immune from judicial process. Courts have intervened in defense of congressional lawmaking prerogatives to block improper presidential exercise of emergency powers[133] and to assert the President's duty to execute mandatory legislative instructions.[134] They have also ordered production of presidential documents needed for orderly functioning of the criminal justice system.[135] Clearly, a proper regard for separation of powers does not require that the courts meekly avert their eyes from presidential excesses while invoking a sterile view of three branches of government entirely insulated from

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[131] *Nixon v. Sirica*, *supra* note 128, 487 F.2d at 711. In *United States v. Nixon*, *supra* note 59, the Supreme Court acknowledged a limited Executive privilege of confidentiality, 418 U.S. at 706-707, but that conclusion was based on practical considerations of government, not constitutional text. We review the likely practical effect of our ruling today in text at notes 137-141 *infra*.

[132] *See Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866); *see also Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

[133] *Youngstown Sheet & Tube Co. v. Sawyer*, *supra* note 55.

[134] *Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

[135] *United States v. Nixon*, *supra* note 59.

each other.[136] Such an abdication of the judicial role would sap the vitality of the constitutional rights whose protection is entrusted to the judiciary.

3. We also find no basis for absolute presidential immunity on what might be termed prudential grounds. We do not believe that any inhibiting effect such suits might have on the presidential will to act should hinder effective governance of the nation. To some extent, of course, the denial of absolute immunity is intended to affect Executive behavior that threatens to violate constitutional rights. We believe, however, that suits that may successfully be pursued against a President will be quite rare.[137] And if we are serious about providing a

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[136] *See Youngstown Sheet & Tube Co. v. Sawyer*, *supra* note 55, 343 U.S. at 635 (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). *See also id.* at 610 (Frankfurter, J., concurring). Judge McGowan has articulated an approach to separation of powers questions that respects both the separateness and the interdependence of the three branches:

> [S]eparation of powers questions are to be resolved by analyzing with particularity the extent to which an act by one branch prevents another from performing its assigned duties and disrupts the balance among the coordinate departments of government. To the extent such interference is perceived, the inquiry must then shift to considering whether the impact of an Act on one branch of government is justified by the need to pursue objectives whose promotion is assigned by the Constitution to a different branch. * * *

Nixon v. Administrator of General Services, 408 F.Supp. 321, 342 (D. D.C. 1976) (three-judge court), *aff'd*, 433 U.S. 425 (1977).

[137] *Cf. Dellums v. Powell*, 561 F.2d 242, 247 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977) (permitting civil damage action for constitutional deprivation despite disruption of

remedy for constitutional violations, there can be no rational basis, as the *Economou* Court emphasized, for holding inferior officials liable for constitutional violations while immunizing those higher up.

> Indeed, the greater power of such [higher] officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. * * *[138]

In addition, the doctrine of qualified immunity, as elaborated by the Supreme Court in *Scheuer v. Rhodes* and by this court in *Apton v. Wilson*, makes allowance for the additional demands on the time and attention of a Chief Executive.[139] The President, like all citizens, must be held to know the relevant law, but he "may be entitled to consult fewer sources and expend less effort inquiring into the circumstances of a localized problem."[140] This

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presidential confidentiality, partly because "the infrequent occasions of such disclosure militate against any substantial fear that the candor of Presidential advisers will be imperiled").

[138] *Butz v. Economou, supra* note 108, 438 U.S. at 506.

[139] *Scheuer v. Rhodes*, 416 U.S. 232, 247-249 (1974); *Apton v. Wilson, supra* note 110, 506 F.2d at 91-92. In *Scheuer v. Rhodes* the Supreme Court stressed the "virtually infinite" range of decisions and choices that may face a Chief Executive in a situation:

> [S]ince the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. * * *

416 U.S. at 247. As this court has stated, such concerns "go to the showing an officer vested with a qualified immunity must make in support of 'good faith belief;' they do not make the qualified immunity itself inappropriate." *Apton v. Wilson, supra* note 110, 506 F.2d at 93.

[140] *Apton v. Wilson, supra* note 110, 506 F.2d at 93.

sliding scale would apply with even greater force if the President were acting in an emergency situation. The President would lose his immunity only if plaintiffs could show that he acted with "actual malice" [141] or that he failed to meet a statutory or constitutional obligation that was clear under the circumstances as understood at the time.[142] Under this approach plaintiffs would have substantial difficulty in defeating a President's claim of immunity, an outcome that helps satisfy our concern that suits like this one would place major and unwarranted demands on a President's time. In considering the case to be made out by plaintiffs before trial,[143] District Courts should be sensitive to the extraordinary practical difficulties confronting a President who is charged in such a suit.[144]

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[141] *See Wood v. Strickland*, *supra* note 114, 420 U.S. at 321.

[142] *See Scheuer v. Rhodes*, *supra* note 139, 416 U.S. at 246-247.

[143] *See* text at notes 119-122 *supra*.

[144] Stressing the crucial importance to democratic government of independent lawmakers, the Supreme Court has recognized an absolute immunity for state and local legislators which parallels the protection afforded to federal lawmakers by the Speech and Debate Clause of the Constitution. Such immunity, the Court has said, spares the legislators the "cost and inconvenience and distractions" of a public trial, and protects them from speculation by a finder of fact as to their motives for legislative actions. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, —— U.S. ——, ——, 47 U.S. L. WEEK 4256, 4260 (March 6, 1979). Taken in the abstract, these considerations might seem to support absolute immunity for the President, or, indeed, for any Executive official. We do not, however, find them compelling here. *Scheuer v. Rhodes*, *supra* note 139, and *Butz v. Economou*, *supra* note 108, establish that high Executive officials in state or federal positions do not enjoy the same immunity as lawmakers do. Because no defensi-

4. We do not think that the personal burden on the President of having to answer civil suits like this one is so great as to justify absolute immunity. Like other Executive officials, he is represented by the Government if he is sued for his official actions,[145] and there seems to be no basis for greater solicitude for the personal finances of a President ordered to pay damages for his constitutional violations than for a governor or a cabinet officer.[146]

Finally, we think the application of qualified immunity to defendant Nixon is mandated by our tradition of equal justice under law. The President is the elected chief executive of our government, not an omniscient leader cloaked in mystical powers. This court has observed that "[s]overeignty remains at all times with the people, and they do not forfeit through elections the right to have the law construed against and applied to every citizen." [147]

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ble distinction can be made between the President and other high Executive officers for immunity purposes, we find no basis for applying to the President the absolute immunity of legislators.

[145] 28 C.F.R. §§ 50.15-50.16 (1978). Representation may be denied if the Department of Justice determines "that it is not in the interest of the United States to represent the employee." *Id.* § 50.15(b)(4). *See also* 28 U.S.C. § 516 (1976).

[146] Legislation is currently pending in Congress that would provide a cause of action against the federal government for individuals harmed by officials acting in the course of duty. H.R. 193, 96th Cong., 1st Sess. (1979). A similar measure was the subject of hearings in the last Congress and was favorably reported by the subcommittee considering it. *Federal Tort Claims Act: Hearings on H.R. 9219 Before the Subcommittee on Administrative Law and Government Relations of the House Judiciary Committee*, 95th Cong., 2d Sess. (1978). By waiving sovereign immunity against *Bivens* suits, such legislation would divert litigation from individual officials.

[147] *Nixon v. Sirica*, *supra* note 128, 487 F.2d at 711.

The Supreme Court noted this truth in *Economou* when it quoted from *United States v. Lee*:[148]

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it.[149]

V. KISSINGER'S SUMMARY JUDGMENT MOTION

The District Court granted summary judgment in favor of defendant Kissinger on the ground that he played an "inactive role" in the surveillance and lacked "oversight authority."[150] We think this ruling was error, since plaintiffs raised genuine issues of material fact as to Kissinger's role in the installation and maintenance of the wiretap.[151] They demonstrated that Kissinger was involved to some extent in the decision to initiate a surveillance program,[152] that he monitored the product of the surveillance for a full year,[153] and that on at least one occasion he directly requested continuation of the Halperin tap.[154]

We, of course, intimate no suggestion as to Kissinger's liability, but only hold that plaintiffs made a sufficient showing as to his supervisory role to survive a motion for summary judgment.

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[148] 106 U.S. (16 Otto) 196, 220 (1882).

[149] *Butz v. Economou*, *supra* note 108, 438 U.S. at 506.

[150] *Halperin v. Kissinger*, *supra* note 4, 424 F. Supp. at 846.

[151] For standards for summary judgment, *see* note 85 *supra*.

[152] *See* text at note 8 *supra*.

[153] That is, from May 1969 until May 1970. *See text* at notes 39-40 *supra*.

[154] *See* text at notes 24-27 *supra*.

Accordingly, the judgment of the District Court is reversed and this case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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June 23, 1972

BY LIAISON

Honorable Henry A. Kissinger
Assistant to the President
for National Security Affairs
The White House
Washington, D. C.

1 - Mr. S. B. Donahoe
1 - Mr. W. V. Cleveland
1 - Mr. E. S. Miller
1 - Mr. G. C. Moore
1 - Mr. F. A. Tansey

Dear Dr. Kissinger:

Enclosed is a copy of a five-page document containing information concerning you. The document was provided to this Bureau by Mr. Carl F. Lane, Assistant Director for Personnel Security, Division of Security, United States Atomic Energy Commission. He stated it was given to Mr. Nathaniel Stetson, Manager of the Atomic Energy Commission Savannah River Operations Office, Aiken, South Carolina, while he was attending the National Student Science Fair in New Orleans, Louisiana, during early May, 1972. We have acknowledged receipt of this information from Mr. Lane but have not disclosed to him that it has been forwarded to you.

161-424-9X1

For your information, our files indicate "The Cross and The Flag" is a magazine published by an extremely anti-Negro and anti-Semitic organization known as the Christian Nationalist Crusade. Our files indicate Frank A. Capell is editor of an expose-type newsletter "The Herald of Freedom."

9X-116 REC-6

Capell, aged 69, has described himself as a person who has been fighting communism "officially and unofficially for 25 years." In the past he has published much information in his newsletter concerning "security risks" in various agencies

Felt
Mohr
Rosen
Bates
Bishop
Callahan
Campbell
Casper
Cleveland
Conrad
Dalbey
Marshall
Miller, E.S.
Ponder
Soyars
Walters
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Mr. Kinley
Mr. Armstrong
Ms. Herwig
Mrs. Neenan

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SEE NOTE ON PAGE TWO

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FBI (23-cv-10741)-394

Honorable Henry A. Kissinger

of the United States Government, particularly the Department of State. In 1943 he worked for the War Production Board in New York City and was arrested by the FBI in September of that year for accepting a bribe while holding that position. He pleaded guilty and was given a suspended sentence, placed on probation, and fined $2,000. In 1965 he was indicted by a Grand Jury in Los Angeles County, California, for criminal libel for printing that a United States Senator from California had been arrested in 1950 for homosexual activities. He was fined $500 and placed on probation for three years after pleading "no contest" to the charge of circulating a false report adversely affecting the Senator's moral reputation.

The enclosed communication is furnished for your information and whatever action you deem appropriate.

Sincerely yours,

L. Patrick Gray III

L. Patrick Gray, III
Acting Director

Enclosure

NOTE:

The enclosed five-page document carries some facts but is filled with scurrilous remarks and innuendos implying that Dr. Kissinger has close contact with, and may be working for, the communists including the Soviets. In view of the nature of the document and the unsavory reputation of Capell, this information is being forwarded to Dr. Kissinger for information and any action he deems appropriate. Acknowledgement of the receipt of the correspondence from Mr. Lane has been handled separately.

WFO 161-267
RMS:sls
1

On September 4, 1973, SA PETER P. OSINSKI determined that following record concerning appointee was contained in the Personnel Security Files, Division of Security, U.S. Atomic Energy Commission, (U.S.A.E.C.) Germantown, Maryland.

Security file WA 114643 disclosed:

1/8/61	U.S.A.E.C. Washington, D.C. granted "Q" clearance to HENRY ALFRED KISSINGER for National Security Council.
7/12/62	This "Q" clearance was terminated 7/12/62 for National Security Council.
2/4/62	The "Q" clearance was extended to U.S. Arms Control and Disarmament Agency, (U.S.A.C.D.A.)
7/10/71	Terminated U.S.A.C.D.A.
2/9/71	"Q" clearance extended to White House for appointee and "Q" clearance continues active.

The file contained no additional pertinent information.

UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

OCT - 5 1973

Miss Jane Dannenhauer
Staff Assistant (Security)
Room 43
Old Executive Office Building
Washington, D. C. 20500

Dear Miss Dannenhauer:

HENRY ALFRED KISSINGER - SECRETARY OF STATE

The Department of State has requested that Henry Alfred Kissinger be authorized access to Restricted Data in connection with his current appointment as Secretary of State.

Pursuant to conversation between you and Mr. Pusateri on October 5, 1973, it would be appreciated if you would authorize the FBI to release a copy of the investigative reports conducted for the White House on Mr. Kissinger in 1969 and 1973.

Your cooperation in this matter is appreciated.

Sincerely,

Earl F. Lane, Assistant Director
for Personnel Security
Division of Security

NOT RECORDED
6 OCT 16 1973

Summary memoranda dated 9/14/73, 9/7/73, and 3/18/69, furnished to AEC on 10/15/73

AUTHORIZATION TO RELEASE
Jane Dannenhauer
PERSONNEL SECURITY OFFICE
OCT 31 1973

FBI (23-cv-10741)-534

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

REC-1

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Director Sec'y	

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1Ø:55PM URGENT AUGUST 19, 1974 JRS

TO DIRECTOR

FROM [redacted]

b3 -5
b7E -1

ANONYMOUS THREAT TO SECRETARY OF STATE HENRY KISSINGER DURING VISIT TO MIAMI, AUGUST 2Ø, 1974.

AKA, HENRY A. KISSINGER

b6 -5 per ICE
b7C -5 per ICE

REFERENCE MIAMI TELETYPES TO BUREAU, AUGUST 19, 1974.

AT 9:ØØ PM, [redacted], U. S. CUSTOMS MIAMI, ADVISED THAT HE HAD JUST RECEIVED INFORMATION FROM A RELIABLE SOURCE AT THE RIVER BAR SOUTH RIVER DRIVE, MIAMI. THE SOURCE MET A MEMBER OF ABDALA, NAME UNKNOWN WHO SAID THERE MIGHT BE EXPLOSION OR BOMBING AT THE FOUNTAIN-BLEU HOTEL IN MIAMI BEACH, AT 8:3Ø (AM OR PM NOT MENTIONED), WHERE SECRETARY OF STATE HENRY KISSINGER IS SCHEDULED TO BE AUGUST 2Ø, 1974.

ABDALA IS AN ANTI-CASTRO ORGANIZATION OF CUBAN EXILE STUDENTS WHO OPPOSE PEACEFUL RELATIONS WITH CUBA.

REC-1 161-424-202X

CUSTOMS AGENT [redacted] HAS NOTIFIED U.S. SECRET SERVICE, MIAMI. b6 -5 per ICE b7C -5 per ICE

CHURCH 43

THE OTHER APPROPRIATE LAW ENFORCEMENT AGENCIES IN DADE COUNTY ALSO ADVISED.

AUG 27 1974

NOT FT

END

cc - Intelligence Div.
amy 8-20-74
W Awley

LRF FBIHQ CLR

Two copies made for delivery to Secy State, USSS and Intel. 8-19-74, 1:23am

DEC 24 1974

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

AUG 19 1974

TELETYPE

NR 014 MM CODE

10:55PM URGENT AUGUST 19, 1974 JRS

TO DIRECTOR

FROM [redacted]

b3 -5
b7E -1

ANONYMOUS THREAT TO SECRETARY OF STATE HENRY KISSINGER DURING VISIT TO MIAMI, AUGUST 20, 1974.

REFERENCE my [redacted] TELETYPES [redacted] AUGUST 19, 1974.

b6 -5 per ICE
b7C -5 per ICE

AT 9:00 PM, [redacted], U. S. CUSTOMS MIAMI, ADVISED THAT HE HAD JUST RECEIVED INFORMATION FROM A RELIABLE SOURCE AT THE RIVER BAR SOUTH RIVER DRIVE, MIAMI. THE SOURCE MET A MEMBER OF ABDALA, NAME UNKNOWN WHO SAID THERE MIGHT BE EXPLOSION OR BOMBING AT THE FOUNTAIN-BLEU HOTEL IN MIAMI BEACH, AT 8:30 (AM OR PM NOT MENTIONED), WHERE SECRETARY OF STATE HENRY KISSINGER IS SCHEDULED TO BE AUGUST 20, 1974.

ABDALA IS AN ANTI-CASTRO ORGANIZATION OF CUBAN EXILE STUDENTS WHO OPPOSE PEACEFUL RELATIONS WITH CUBA.

b6 -5 per ICE
b7C -5 per ICE

CUSTOMS AGENT [redacted] HAS NOTIFIED U.S. SECRET SERVICE, MIAMI.

THE OTHER APPROPRIATE LAW ENFORCEMENT AGENCIES IN DADE COUNTY ALSO ADVISED.

END

LRF FBIHQ CLR

- 2 -

FBI (23-cv-10741)-858

OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

NI

[redacted]

: DIRECTOR, FBI

DATE: 1/5/76

b6 -1
b7C -1

[redacted]

FROM [redacted], ALEXANDRIA (89-0) (C)

[redacted]

SUBJECT: BLACK SEPTEMBER; ORGANIZATION;
HENRY KISSINGER-VICTIM
INFORMATION CONCERNING

b3 -5
b7E -1

[redacted]

Enclosed for the Bureau are five copies of an LHM captioned as above.

For the information of the Bureau confidential source mentioned in LHM is a source of the Alcohol, Tobacco, and Firearms, Treasury Department. The Special Agent of the Alexandria Office is SA KEITH R. FITZPATRICK.

It is pointed out to the Bureau that the source is of unknown reliability to the FBI and the information contained herein was furnished during the investigation of another matter. In addition, the information is virtually impossible to verify inasmuch as the confidential source is not in constant contact with [redacted] LNU.

b6 -1,4
b7C -1,4
b7D -5

[redacted]

ORIGINAL IN

ENCLOSURE

ENCLOSURE

161-424-

2- Bureau (Enc. 5)
2- Alexandria
KRF: [redacted]
(4)

NOT RECORDED
145 FEB 11 1976

b3 -5
b6 -1
b7C -1
b7E -14

15 JAN 7 1976

[redacted]

1/5/76

[redacted]

Sec. of State not covered by AFO Limits, however, is protected by 4555.

[redacted]

69

59 FEB 2 1976

[redacted]

FEB 2 1976

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
Alexandria, Virginia
January 5, 1976

In Reply, Please Refer to File No.

BLACK SEPTEMBER ORGANIZATION;
HENRY KISSINGER - VICTIM
INFORMATION CONCERNING

A confidential source of another government agency advised a Special Agent of the Alexandria Office of the Federal Bureau of Investigation (FBI) that a man named [redacted] Last Name Unknown, who allegedly works at [redacted] stated that [redacted] further advised that the Black September Organization was also unhappy with Henry Kissinger, Secretary of State, United States, and that they, Black September, were going to kill Kissinger. b3 -5 b6 -4 b7C -4 b7D -5 b7E -14

[redacted] gave no details of the plot to kill Kissinger nor did he cite any basis in fact for his allegations. b6 -4 b7C -4 b7D -5

The confidential source is of unknown reliability to the FBI.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

161-4084

ENCLOSURE

ENCLOSURE

Appendix

BLACK SEPTEMBER ORGANIZATION

The Black September Organization is an elite band formed within the Special Services force of Al Fatah and has been held responsible for the atrocities at Munich and the assassination of the Jordanian Prime Minister in Cairo during November, 1971. The name of this group commemorates the September, 1971, "civil war" in Jordan, during which government forces practically eliminated the Fedayeen presence.

LA0527 1420354Z

PP HQ CE CG CI CV SL WF

DE LA

P 220354Z MAY 77

FM LOS ANGELES (185-NEW) (5) (P)

TO DIRECTOR (PRIORITY)

[redacted] HARLOTTE (PRIORITY)

CHICAGO (PRIORITY)

CINCINNATI (PRIORITY)

CLEVELAND (PRIORITY)

ST. LOUIS (PRIORITY)

WASHINGTON FIELD (PRIORITY) ALL OFFICES VIA HQ

BI

~~E F T O~~

UNSUB; MEMBERS OF THE NATIONAL SOCIALIST CONGRESS, AKA UNITED WHITE PEOPLES PARTY, NATIONAL SOCIALIST PARTY OF AMERICA, NATIONAL SOCIALIST LIBERATION FRONT; ASSASSINATION THREATS: HENRY KISSINGER - VICTIM; ARTHUR REUBLOFF - VICTIM; PHILLIP KLUTZNICK - VICTIM; JACK GREENBERG - VICTIM; ROBERT SARNOFF - VICTIM; AND [redacted] VICTIM; AND SIX UNKNOWN VICTIMS. THREATS TO BOMB: EMBASSY OF THE SOVIET UNION, WASHINGTON, D.C.; EMBASSY OF ISRAEL, WASHINGTON, D.C.; EMBASSIES OF BLACK AFRICAN NATIONS,

b6 -1
b7C -1

FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

MAY 27 12 44 PM '77

Assoc. Dir.
Dep. AD Adm.
Dep. AD Inv.
Asst. Dir.:
Adm. Serv.
Crim. Inv.
Fin. & Pers.
Ident.
Intell.
Laboratory
Legal Coun.
Plan. & Insp.
Rec. Mgnt.
Spec. Inv.
Tech. Servs.
Training
Public Affs. Off.
Telephone Rm.
Director's Sec'y

FBI/DOJ
12-17-91
9803 [redacted]
FOIPA# 284,945

b6 -1
b7C -1

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE ~~10-12-99~~ BY per Comp # 77,519

E.F.T.O.

b6 -8
b7C -8

REC 21 185-875

MAY 24 1977

b6 -1
b7C -1

TELETYPED TO: A 54 JUN 8 399 1977

WASHINGTON, D.C.; B'NAI B'RITH, WASHINGTON, D.C., ALLEGED BOMBING OF THREE RESIDENCES INHABITED BY BLACK FAMILIES, CHICAGO, ILLINOIS, APRIL 20, 1977; PFO - CRIMINAL; EID; CR; RICO.

RECENT INVESTIGATION BY THE LOS ANGELES DIVISION OF THE FBI HAS DETERMINED THE FOLLOWING:

THE NATIONAL SOCIALIST LIBERATION FRONT (NSLF) IN THE GREATER LOS ANGELES AREA HAS A MAILING ADDRESS OF POST OFFICE BOX 4168, PANORAMA CITY, CALIFORNIA, 91402. THE POST OFFICE BOX WAS RENTED BY [redacted] ON OCTOBER 22, 1975, IN THE NAME OF THE NATIONAL SOCIALIST LIBERATION FRONT. [redacted] PROVIDED AN ADDRESS OF [redacted] AND A TELEPHONE NUMBER OF [redacted] PROVIDED CALIFORNIA DRIVER'S LICENSE NUMBER [redacted] FOR IDENTIFICATION PURPOSES. b6 -4 b7C -4 b6 -4 b7C -4

ON [redacted] WAS ARRESTED BY THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS (BATF) IN SANTA MONICA, CALIFORNIA, [redacted] DURING THE COURSE OF THE ARREST [redacted] STATED THE NSLF WAS "DEAD" FROM LACK OF SUPPORT b6 -4 b7C -4 b6 -4 b7C -4

AND INFORMANT INFILTRATION. ON [redacted] b6 -4 b7C -4

[redacted]

[redacted] IS DESCRIBED AS A WHITE MALE, b6 -4 b7C -4

BORN [redacted], SIX FEET ONE INCH, 160 POUNDS,

BROWN HAIR AND BLUE EYES.

SOURCE ONE ADVISED MEMBERSHIP IN THE NSLF HAS b6 -4 b7C -4

DWINDLED UNDER THE LEADERSHIP OF [redacted], AND THAT THE

ORGANIZATION HAS IN EFFECT BEEN DEFUNCT SINCE

APPROXIMATELY JULY 1976.

SOURCE TWO ADVISED THE NSLF HAS NOT BEEN ACTIVE IN LOS ANGELES FOR THE LAST SIX MONTHS DUE TO A LACK OF LEADERSHIP.

SOURCE THREE ADVISED THE NSLF IN LOS ANGELES IS FOR ALL PRACTICAL PURPOSES NON-EXISTENT. SOURCE ADVISED THERE IS NO HEADQUARTERS LOCATION FOR THE GROUP IN LOS ANGELES,

[redacted] b7D -3 b7E -4

[redacted]

SOURCE FOUR ADVISED THE NSLF IN LOS ANGELES IS MAINLY A "PAPER ORGANIZATION" THAT IS UNABLE TO CARRY OUT ANY THREATS OR PROMISES. SOURCE ADVISED [redacted] b7D -3 b7E -4

[redacted] AND THAT MEMBERSHIP AT THAT TIME WAS APPROXIMATELY [redacted].

ADMINISTRATIVE

RE CLEVELAND TEL TO DIRECTOR AND OTHER INSTANT ADDRESSEES, MAY 20, 1977.

FOR INFO OF RECEIVING OFFICES, PANORAMA CITY, CALIFORNIA IS SIMPLY A POSTAL DESIGNATION FOR A SMALL AREA LOCATED IN THE NORTH-CENTRAL SAN FERNANDO VALLEY SECTION OF THE CITY OF LOS ANGELES.

THERE IS NO INDICATION THAT ANY OF THE CAPTIONED VICTIMS RESIDE IN THE LOS ANGELES DIVISION.

SOURCES UTILIZED IN INSTANT TEL INCLUDE THE FOLLOWING: SOURCE ONE - [redacted] SOURCE TWO - [redacted] b7D -1,5 b7E -5,21 CALIFORNIA; SOURCE THREE - [redacted]; SOURCE FOUR - [redacted].

LOS ANGELES WILL MAKE ADDITIONAL INQUIRIES RE CAPTIONED MATTER AND EXPEDITIOUSLY FURNISH ANY POSITIVE INFO DEVELOPED.

BT

CV 185-65

Copies continued:

2 - Buffalo (185-24) (RM)
2 - Chicago (157-5668) (RM)
(1 - Secret Service,
Chicago, Illinois) (By Hand)
1 - Cincinnati (185-24) (Info) (RM)
1 - Charlotte (185-20) (Info) (RM)
1 - Los Angeles (185-209) (Info) (RM)
1 - Louisville (185-12) (Info) (RM)
1 - St. Louis (185-71) (Info) (RM)
1 - Washington Field (185-495) (Info) (RM)

REFERENCES

Cleveland teletype to the Bureau, 5/20/77.
Chicago teletype to the Bureau, 5/23/77.
Cleveland teletype to the Bureau, 5/26/77.
Cincinnati teletype to the Bureau, 5/23/77.
Charlotte teletype to the Bureau, 5/23/77.
Los Angeles teletype to the Bureau, 5/22/77.
Baltimore teletype to the Bureau, 5/24/77.
St. Louis teletype to the Bureau, 5/21/77.
Louisville teletype to the Bureau, 6/2/77.
Buffalo letter to the Bureau, 6/20/77.

- C -

ADMINISTRATIVE

For the information of the Bureau, in the interest of brevity not all communications in this matter were set forth as references.

For the information of Buffalo, this report contains all investigation completed to date in instant matter. After reviewing this report, Buffalo may wish to interview [redacted] as set forth in their referenced communication regarding his knowledge of any plot or possible bombing attempt. Buffalo, should they interview [redacted] is requested to furnish the results to Cleveland as well as the Bureau and any other interested office in order that Cleveland's file on this matter may be complete. b6 -4 b7C -4

All recipients should be alert to any activity on the part of the Nazi Party which could constitute a violation of law, noting no investigation of the organization per se has or will be conducted.

Instant investigation has shown that various factions of the Nazi Party do exist and that some espouse violence. It is also noted that the Ku Klux Klan and the American Nazi factions are holding joint meetings in an effort to organize and promote unity among their organizations. It has also been stated that at least one faction may be purchasing a 400 acre farm to be used as a hideout for fugitives and escapees and it is reported that this farm has a sizable quantity of weapons.

All offices should be alert to the fact that although present Attorney General guidelines prohibit investigation of these organizations under Domestic Security violations, some factions or persons may be in violation of Civil Rights Statutes, RICO Statutes, EID Statutes as well as other criminal violations where the FBI does have investigative authority.

The Bureau has advised that inasmuch as no information has been developed to indicate the alleged threats in this matter have substance in fact, the alleged victims should be so advised.

Each office covering the residence of an alleged victim is requested to advise those individuals that investigation failed to develop any information indicating the alleged plot has any basis in fact.

INFORMANTS

CV T-1 is [redacted] b6 -2 b7C -2 b7D -5

CV T-2 is [redacted]

CV T-3 is [redacted] b7D -1,5 b7E -5,21

CV T-4 is [redacted]

CV T-5 is [redacted] b7D -1 b7E -21

CV T-6 is [redacted] b6 -2 b7C -2 b7D -5

CV T-7 is [redacted]

The NSLF in the Greater Los Angeles area has a mailing address of Post Office Box 4168, Panorama City, California 91402. The Post Office box was rented by [redacted] on October 22, 1975, in the name of the NSLF. [redacted] provided an address of [redacted] and a telephone number of [redacted] provided California driver's license number [redacted] for identification purposes b6 -4 b7C -4

On [redacted] was arrested by the Bureau of Alcohol, Tobacco and Firearms (ATF) in Santa Monica, California, [redacted] During the course of the arrest [redacted] stated the NSLF was "dead" from lack of support and informant infiltration. On [redacted] b6 -4 b7C -4

[redacted] is described as follows:

Race	White
Sex	Male
Born	[redacted]
Height	6'1"
Weight	160 pounds
Hair	Brown
Eyes	Blue

b6 -4 b7C -4

CV T-3 advised membership in the NSLF has dwindled under the leadership of [redacted] and that the organization has in effect been defunct since approximately July 1976. b6 -4 b7C -4

CV T-4 advised the NSLF has not been active in Los Angeles for the last six months due to a lack of leadership.

CV T-5 advised the NSLF in Los Angeles is for all practical purposes non-existent. CV T-5 advised there is no headquarters location for the group in Los Angeles, [redacted] b7D -3 b7E -4

CV T-6 advised the NSLF in Los Angeles is mainly a "paper organization" that is unable to carry out any threats or promises. CV T-6 advised [redacted] b7D -3 b7E -4
[redacted] and that membership at that time was approximately six [redacted].

[redacted] was interviewed May 31, 1977 at the [redacted] b6 -4 b7C -4

[redacted] aknowledged [redacted] the NSLF in the Los Angeles area, a group that has been defunct since May 1976. The NSLF objective was survival of the white race and any action to preserve the white race was justified. b6 -4 b7C -4

[redacted] stated the NSC does not adhere to extremist action and only holds meetings, publishes papers and occasionally demonstrates. b6 -4 b7C -4

[redacted] claimed he was not cognizant of any alleged NSC activity planned on July 4,1977, that included the assassination of captioned victims or the bombing of selected embassies in Washington, D.C. b6 -4 b7C -4

[redacted] denied he has ever conducted NSLF exercises in firearms training and demolitions in the Panorama City area of Los Angeles. b6 -4 b7C -4

[redacted] advised he has never traveled to the Midwest or East Coast on NSC or NSLF activities as he operated with the NSLF in the Southern California area. The only National Socialist official he has ever personally met was [redacted] from Ohio, whom [redacted] met in Los Angeles. [redacted] is aware [redacted] of the NSC in Chicago and [redacted] NSC in Cleveland. b6 -4 b7C -4

Any information he is involved in captioned matter is erroneous. [redacted] stated that [redacted] to such activity would give the credence to NSC members. [redacted] stated the NSLF in Los Angeles was given credit by the media for the bombing of the Socialist Workers Party Headquarters and the tear gassing of a public hearing on reopening the ROSENBURG spy case. [redacted] noted [redacted] received some publicity in the newspaper "National Socialist". [redacted] had been arrested by ATF after he had given an ATF undercover agent a .22 caliber rifle and silencer with instruction to assassinate a National Socialist White Peoples Party member who had murdered NSLF leader JOE TOMMASI in Los Angeles. [redacted] noted on July 4, 1977, he will be [redacted] b6 -4 b7C -4

[redacted] is a white male, born [redacted] b6 -4 b7C -4

The following investigation was conducted by the Baltimore Division of the FBI:

[redacted] is believed to be identical to [redacted], also known as [redacted] was the subject of [redacted] investigation in [redacted], regarding his activities with the NSWPP. b6 -4 b7C -4

[redacted] is described as follows:

Race	White
Sex	Male
Date of Birth	[redacted]
Height	5'11"
Weight	149 pounds
Hair	Brown
Eyes	Hazel

b6 -4 b7C -4

On May 27, 1977, [redacted] was interviewed at the residence of [redacted] by Bureau Agents. After being furnished the identities of the interviewing Agents and advised that he was being intrviewed for any information concerning captioned matter, [redacted] b6 -4 b7C -4

Post Office Box 2118
Detroit, Michigan 48231
September 26, 1978

Special Agent in Charge
United States Secret Service
317 Federal Building and
U. S. Courthouse
Detroit, Michigan 48226

Dear Sir:

Reference is made to prior communications dated February 2, 1977 and February 9, 1977, captioned [redacted] Threatening Letter Received at the FBI Office, Saginaw, Michigan, January 24, 1977, Threats Against Secretary of State Henry Kissinger and letter dated July 12, 1978, also concerning [redacted]. b6 -4 b7C -4

Enclosed is the original of a three page letter and the envelope that contained it signed [redacted] and with the initials [redacted] on the envelope. b6 -4 b7C -4

The enclosed letter was received via First Class Mail at the FBI Office, Saginaw, Michigan, on September 25, 1978.

While no direct threats are made in the ltter it does appear that veiled threats against ex-Secretary of State Henry Kissinger are made.

The above is being furnished to you due to your previous interest in [redacted] for whatever action you may deem necessary. b6 -4 b7C -4

1 - Addressee
(1) - Detroit (175-193)
[redacted]

Very truly yours,

O. Franklin Lowie, b6 -1
Special Agent in Charge b7C -1

FBI (23-cv-10741)-2068

By:
Frederick J. Goedtel
Supervisory Special Agent

175-193-20

SEARCHED [redacted] b6 -1
SERIALIZED [redacted] b7C -1
INDEXED
FILED [redacted]

NR028 WA CODE

2:46 PM URGENT 2-15-74 GXC

TO ALBUQUERQUE
DALLAS
EL PASO
HOUSTON
LAS VEGAS
LOS ANGELES
MIAMI
NEW YORK
PHOENIX
SAN ANTONIO
SAN DIEGO
WASHINGTON FIELD

FROM DIRECTOR 1P

62-2842

VISIT OF SECRETARY OF STATE DR. HENRY KISSINGER TO MEXICO CITY ON FEB. 20 THROUGH FEB. 23, 1974 IS-MEXICO.

SECRET SERVICE HAS PROTECTIVE RESPONSIBILITY FOR THE VISIT OF THE SECRETARY AND REQUESTS IT BE ADVISED OF ALL PERTINENT INTELLIGENCE INFORMATION REGARDING THE ABOVE VISIT.

SECRET SERVICE CLASSIFIED DATA ~~CONFIDENTIAL~~. HANDLE IN ACCORDANCE WITH SECTIONS 105B AND 146 MANUAL OF INSTRUCTIONS.

LEGAT MEXICO ADVISED SEPARATELY.

END

PLS RETURN TO TALK TU

62-2842-2